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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM MAY 4, 1920, TO DECEMBER 31, 1920

OFFICIAL REPORT

VOLUME 58

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1921

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MAY 14 1921

SAN FRANCISCO

**THE FILMER BROTHERS ELECTROTYPE COMPANY
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JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, THE HON. JOHN HURLY, THE HON. JOHN A. MATTHEWS, THE HON. CHARLES H. COOPER,	}	Associate Justices.
--	---	----------------------------

OFFICERS OF THE COURT:

S. CLARENCE FORD, Attorney General.

FRANK WOODY, Asst. Attorney General.

CLARENCE N. DAVIDSON, Asst. Attorney General.

***ALBERT A. GROBUD, Asst. Attorney General.**

OTTO A. GERTH, Asst. Attorney General.

†CARL E. CAMERON, Asst. Attorney General.

JAMES T. CARROLL, Clerk.

M. N. RACE, Marshal.

A. C. SCHNEIDER, Court Stenographer.

*** Resigned December 1, 1920.**

† Appointed December 1, 1920, to succeed Albert A. Grobud, resigned.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from September 30, 1920, to March 10, 1921.

BAIRD, EDWARD R., Admitted November 8, 1920.

BAREON, WILLIAM W., Admitted October 4, 1920.

BERTOGLIO, ANTONE R., Admitted October 18, 1920.

BUSHA, CHARLES T., Admitted April 5, 1920.

CHADLE, EDWIN K., JR., Admitted December 20, 1920.

CHEATHAM, WALTER H., Admitted November 8, 1920.

COPELAND, R. H., Admitted March 10, 1921.

DONLEY, R. L., Admitted September 20, 1920.

GAMMON, NATHAN, Admitted March 8, 1921.

GRASS, CHARLES F., Admitted December 6, 1920.

HARRINGTON, RAYMOND S., Admitted January 19, 1920.

KARRICK, DAVID B., Admitted December 20, 1920.

KEOGAN, THOMAS M., Admitted October 18, 1920.

MC ELWAIN, J. E., Admitted February 21, 1921.

MILLS, WALLACE F., Admitted December 6, 1920.

RUCKER, J. E., Admitted November 29, 1920.

RUST, JAMES H., Admitted January 22, 1921.

STEPHENSON, D. A., Admitted September 20, 1920.

SULLIVAN, JOHN F., Admitted January 6, 1921.

TRIPLETT, GEORGE V., JR., Admitted November 8, 1920.

WYMOND, HAWLEY, Admitted January 24, 1921.

ERRATUM IN 57 MONTANA.

In case of *State ex rel. Goodman v. Stewart*, 57 Mont. 145, in line 3 from bottom of page, for "Mr. Woody argued the cause orally," read "Mr. Woody, and Mr. Wellington D. Rankin, *Amicus Curiae*, argued the cause orally."

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DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA
1921

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.

District Judges: Hon. W. H. Poorman; Hon. A. J. Horsky.

Officers: County Attorney: Jos. R. Wine, Esq.

Clerk of District Court: Will Whalen.

Sheriff: Geo. W. Huffaker.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.

**District Judges: Hon J. J. Lynch; Hon. Wm. E. Carroll;
Hon. Joseph R. Jackson.**

Officers: County Attorney: Geo. Bourquin, Esq.

Clerk of District Court: J. F. Driscoll.

Sheriff: Larry Duggan.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.

District Judge: Hon. George B. Winston.

Officers of Deer Lodge County (County Seat, Anaconda):

County Attorney: J. B. C. Knight, Esq.

Clerk of District Court: E. B. Heagy.

Sheriff: C. L. Beall.

Officers of Granite County (County Seat, Philipsburg) :

County Attorney: Wingfield L. Brown, Esq.

Clerk of District Court: Wm. B. Calhoun.

Sheriff: Fred. C. Burks.

Officers of Powell County (County Seat, Deer Lodge) :

County Attorney: E. J. Cummins, Esq.

Clerk of District Court: R. Lee Kelley.

Sheriff: J. E. Neville.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCulloch;
Hon. Theodore Lentz.

Officers of Mineral County (County Seat, Superior) :

County Attorney: W. L. Hyde, Esq.

Clerk of District Court: Harold B. Ives.

Sheriff: Wm. La Combe.

Officers of Missoula County (County Seat, Missoula) :

County Attorney: John L. Campbell, Esq.

Clerk of District Court: Harry M. Rawn.

Sheriff: Wm. H. Houston.

Officers of Ravalli County (County Seat, Hamilton) :

County Attorney: J. D. Taylor, Esq.

Clerk of District Court: J. Q. Adams.

Sheriff: Clarence E. Hogue.

Officers of Sanders County (County Seat, Thompson Falls) :

County Attorney: Adelbert A. Alvord, Esq.

Clerk of District Court: L. E. Smith.

Sheriff: Joseph L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

***District Judge: Hon. Joseph C. Smith.**

Officers of Beaverhead County (County Seat, Dillon):

County Attorney: Thos. E. Gilbert, Esq.

Clerk of District Court: Wm. E. Stephenson.

Sheriff: Daniel F. Mooney.

Officers of Jefferson County (County Seat, Boulder):

County Attorney: J. E. Kelly, Esq.

Clerk of District Court: Jas. S. Flaherty.

Sheriff: T. L. Locker.

Officers of Madison County (County Seat, Virginia City):

County Attorney: Edgar P. Reid, Esq.

Clerk of District Court: Matt Carey.

Sheriff: Clarence W. Hungerford.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney: Elbert F. Allen, Esq.

Clerk of District Court: W. H. Pethybridge.

Sheriff: James McClarty.

Officers of Stillwater County (County Seat, Columbus):

County Attorney: M. L. Parcells, Esq.

Clerk of District Court: G. B. Iverson.

Sheriff: Edward B. Fellows.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney: Horace S. Davis, Esq.

Clerk of District Court: J. E. Rees.

Sheriff: G. B. Long.

*** Successor to Hon. W. A. Clark, deceased, not yet appointed.**

JUDICIAL DISTRICTS OF THE

SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, McCone, Richland and Wibaux.

District Judge: Hon. Frank P. Leiper.

Officers of Dawson County (County Seat, Glendive):

County Attorney: F. S. P. Foss, Esq.

Clerk of District Court: Frank A. Parrett.

Sheriff: A. H. Helland.

Officers of McCone County (County Seat, Circle):

County Attorney: Homer A. Hoover, Esq.

Clerk of District Court: C. F. Campbell.

Sheriff: Floyd Davis.

Officers of Richland County (County Seat, Sidney):

County Attorney: L. V. Ketter, Esq.

Clerk of District Court: Guy L. Rood.

Sheriff: Fred. D. Sullivan.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney: Elmer W. Cowee, Esq.

Clerk of District Court: C. L. Deringer.

Sheriff: A. Barclay.



EIGHTH JUDICIAL DISTRICT.

County of Cascade.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney: Howard G. Bennet, Esq.

Clerk of District Court: Alex. Remneas.

Sheriff: Bob. Gordon.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: E. F. Bunker, Esq.

Clerk of District Court: W. L. Hays.

Sheriff: Chas. C. Esgar.

TENTH JUDICIAL DISTRICT.

Counties of Judith Basin and Fergus.

District Judges: Hon. Roy E. Ayers; Hon. Rudolph Von Tobel.

Officers of Fergus County, (County Seat, Lewistown):

County Attorney: E. J. Baker, Esq.

Clerk of District Court: Bert Replogle.

Sheriff: Wm. B. Woods, Jr.

Officers of Judith Basin County (County Seat, Stanford):

County Attorney: John D. Mussey, Esq.

Clerk of District Court: F. Clark Grady.

Sheriff: C. H. Kelley.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. Chas. W. Pomeroy.

Officers of Flathead County (County Seat, Kalispell):

County Attorney: Dean King, Esq.

Clerk of District Court: R. N. Eaton.

Sheriff: W. R. Martin.

Officers of Lincoln County (County Seat, Libby):

County Attorney: W. H. Gray, Esq.

Clerk of District Court: Fred. F. Clark.

Sheriff: Frank R. Baney.

TWELFTH JUDICIAL DISTRICT.

County of Chouteau.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: H. F. Miller, Esq.

Clerk of District Court: Geo. D. Patterson.

Sheriff: M. Flanagan.

THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. A. C. Spencer; Hon. Robt. S. Stong.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Louis E. Haven, Esq.

Clerk of District Court: Geo. H. Miller.

Sheriff: John MacLeod.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: C. C. Rowan, Esq.

Clerk of District Court: H. P. Sandels.

Sheriff: Wm. Smith.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: E. E. Collins, Esq.

Clerk of District Court: Fred Inabnit.

Sheriff: E. M. Birely.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Broadwater, Meagher and Wheatland.

District Judge: Hon. W. L. Ford.

Officers of Broadwater County (County Seat, Townsend):

County Attorney: H. H. Holloway, Esq.

Clerk of District Court: Fred Bubser.

Sheriff: Chas. B. Doggett.

Officers of Meagher County (County Seat, White Sulphur Springs) :

County Attorney: C. L. Tyman, Esq.

Clerk of District Court: F. H. Mayn.

Sheriff: Elmer Butler.

Officers of Wheatland County (County Seat, Harlowton) :

County Attorney: W. C. Husband, Esq.

Clerk of District Court: A. T. Anderson.

Sheriff: L. W. Clark.

FIFTEENTH JUDICIAL DISTRICT.

Counties of Golden Valley, Musselshell, Rosebud and Treasure.

District Judge: Hon. Geo. A. Horkan.

Officers of Golden Valley County (County Seat, Ryegate) :

County Attorney: C. W. Noyes, Esq.

Clerk of District Court: M. J. Dourte.

Sheriff: Jesse Garfield.

Officers of Musselshell County (County Seat, Roundup) :

County Attorney: C. F. Maris, Esq.

Clerk of District Court: Henry F. Whitman.

Sheriff: Chris. H. Rusch.

Officers of Rosebud County (County Seat, Forsyth) :

County Attorney: I. S. Crawford, Esq.

Clerk of District Court: D. J. Muri.

Sheriff: Cecil E. Thompson.

Officers of Treasure County (County Seat, Hysham) :

County Attorney: E. D. Gerye, Esq.

Clerk of District Court: J. D. Clark.

Sheriff: T. J. Cunningham.

SIXTEENTH JUDICIAL DISTRICT.

Counties of Custer, Fallon, Prairie, Carter, Powder River and Garfield.

District Judges: Hon. S. D. McKinnon; Hon. S. E. Felt.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: Rudolph Nelstead, Esq.

Clerk of District Court: Hallie B. Campbell.

Sheriff: Geo. S. Boggs.

Officers of Custer County (County Seat, Miles City):

County Attorney: R. B. Hayes, Esq.

Clerk of District Court: C. A. Lindeberg.

Sheriff: H. Farnum.

Officers of Fallon County (County Seat, Baker):

County Attorney: D. R. Young, Esq.

Clerk of District Court: Ralph Keener.

Sheriff: F. F. Kelling.

Officers of Garfield County (County Seat, Jordan):

County Attorney: John J. Cavan, Esq.

Clerk of District Court: J. P. MacDonald.

Sheriff: R. F. Myers.

Officers of Powder River County (County Seat, Broadus):

County Attorney: N. A. Burkey, Esq.

Clerk of District Court: H. R. Straiton.

Sheriff: W. E. Sutter.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.

Clerk of District Court: S. A. Barber.

Sheriff: E. H. Brooks.

SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips and Valley.

District Judge: Hon. Carl D. Borton.

Officers of Phillips County (County Seat, Malta):

County Attorney: B. P. Sandlie, Esq.

Clerk of District Court: C. M. Porter.

Sheriff: Thos. S. Johnson.

Officers of Valley County (County Seat, Glasgow):

County Attorney: Lincoln Working, Esq.

Clerk of District Court: J. B. Christopherson.

Sheriff: Chas. Hall.

EIGHTEENTH JUDICIAL DISTRICT.

Counties of Blaine, Hill and Liberty.

District Judge: Hon. Chas A. Rose.

Officers of Blaine County (County Seat, Chinook):

County Attorney: D. L. Blackstone, Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: Harry F. Becker.

Officers of Hill County (County Seat, Havre):

County Attorney: Max P. Kuhr, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Henry F. Schwartz.

Officers of Liberty County (County Seat, Chester):

County Attorney: B. R. McCabe, Esq.

Clerk of District Court: George H. Gau.

Sheriff: John H. Morgan.

NINETEENTH JUDICIAL DISTRICT.

Counties of Glacier, Pondera, Teton and Toole.

District Judge: Hon. John J. Greene.

Officers of Glacier County (County Seat, Cut Bank):

County Attorney: Wiley J. Shannon, Esq.

Clerk of District Court: Thos. B. Magee.

Sheriff: P. A. Davis.

Officers of Pondera County (County Seat, Conrad):

County Attorney: Wm. L. Bullock.

Clerk of District Court: C. H. Shepherd.

Sheriff: Frank Stocke.

Officers of Teton County (County Seat, Chouteau):

County Attorney: George W. Magee, Esq.

Clerk of District Court: B. M. Jacobson.

Sheriff: I. S. Martins.

Officers of Toole County (County Seat, Shelby):

County Attorney: J. S. McClory, Esq.

Clerk of District Court: M. P. Lyons.

Sheriff: J. S. Alsup.

TWENTIETH JUDICIAL DISTRICT.

Counties of Daniels, Roosevelt and Sheridan.

District Judge: Hon. C. E. Comer.

Officers of Daniels County (County Seat, Scobey):

County Attorney: John S. Nyquist, Esq.

Clerk of District Court: John Shippam.

Sheriff: D. J. Martin.

Officers of Roosevelt County (County Seat, Poplar):

County Attorney: Frank M. Catlin, Esq.

Clerk of District Court: Thos. R. Forbes.

Sheriff: P. J. Nacey.

Officers of Sheridan County (County Seat, Plentywood):

County Attorney: Arthur C. Erickson, Esq.

Clerk of District Court: Carl B. Peterson.

Sheriff: L. J. Collins.

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SIXTEENTH JUDICIAL DISTRICT.

Counties of Custer, Fallon, Prairie, Carter, Powder River and Garfield.

District Judges: Hon. S. D. McKinnon; Hon. S. E. Felt.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: Rudolph Nelstead, Esq.

Clerk of District Court: Hallie B. Campbell.

Sheriff: Geo. S. Boggs.

Officers of Custer County (County Seat, Miles City):

County Attorney: R. B. Hayes, Esq.

Clerk of District Court: C. A. Lindeberg.

Sheriff: H. Farnum.

Officers of Fallon County (County Seat, Baker):

County Attorney: D. R. Young, Esq.

Clerk of District Court: Ralph Keener.

Sheriff: F. F. Kelling.

Officers of Garfield County (County Seat, Jordan):

County Attorney: John J. Cavan, Esq.

Clerk of District Court: J. P. MacDonald.

Sheriff: R. F. Myers.

Officers of Powder River County (County Seat, Broadus):

County Attorney: N. A. Burkey, Esq.

Clerk of District Court: H. R. Straiton.

Sheriff: W. E. Sutter.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.

Clerk of District Court: S. A. Barber.

Sheriff: E. H. Brooks.

SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips and Valley.

District Judge: Hon. Carl D. Borton.

Officers of Phillips County (County Seat, Malta):

County Attorney: B. P. Sandlie, Esq.

Clerk of District Court: C. M. Porter.

Sheriff: Thos. S. Johnson.

Officers of Valley County (County Seat, Glasgow):

County Attorney: Lincoln Working, Esq.

Clerk of District Court: J. B. Christopherson.

Sheriff: Chas. Hall.

EIGHTEENTH JUDICIAL DISTRICT.

Counties of Blaine, Hill and Liberty.

District Judge: Hon. Chas A. Rose.

Officers of Blaine County (County Seat, Chinook):

County Attorney: D. L. Blackstone, Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: Harry F. Becker.

Officers of Hill County (County Seat, Havre):

County Attorney: Max P. Kuhr, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Henry F. Schwartz.

Officers of Liberty County (County Seat, Chester):

County Attorney: B. R. McCabe, Esq.

Clerk of District Court: George H. Gau.

Sheriff: John H. Morgan.

NINETEENTH JUDICIAL DISTRICT.

Counties of Glacier, Pondera, Teton and Toole.

District Judge: Hon. John J. Greene.

Officers of Glacier County (County Seat, Cut Bank):

County Attorney: Wiley J. Shannon, Esq.

Clerk of District Court: Thos. B. Magee.

Sheriff: P. A. Davis.

Officers of Pondera County (County Seat, Conrad):

County Attorney: Wm. L. Bullock.

Clerk of District Court: C. H. Shepherd.

Sheriff: Frank Stocke.

Officers of Teton County (County Seat, Chouteau):

County Attorney: George W. Magee, Esq.

Clerk of District Court: B. M. Jacobson.

Sheriff: I. S. Martins.

Officers of Toole County (County Seat, Shelby):

County Attorney: J. S. McClory, Esq.

Clerk of District Court: M. P. Lyons.

Sheriff: J. S. Alsup.

TWENTIETH JUDICIAL DISTRICT.

Counties of Daniels, Roosevelt and Sheridan.

District Judge: Hon. C. E. Comer.

Officers of Daniels County (County Seat, Scobey):

County Attorney: John S. Nyquist, Esq.

Clerk of District Court: John Shippam.

Sheriff: D. J. Martin.

Officers of Roosevelt County (County Seat, Poplar):

County Attorney: Frank M. Catlin, Esq.

Clerk of District Court: Thos. R. Forbes.

Sheriff: P. J. Nacey.

Officers of Sheridan County (County Seat, Plentywood):

County Attorney: Arthur C. Erickson, Esq.

Clerk of District Court: Carl B. Peterson.

Sheriff: L. J. Collins.

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SUPREME COURT RULES.

**For the Rules of the Supreme Court of the State of Montana,
see 53 Mont. xxvii.**

Amendment, see 54 Mont. xxxi.

(xxxii)

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
MARCH TERM, 1920.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,	}	Associate Justices.
THE HON. JOHN HURLY,		
THE HON. JOHN A. MATTHEWS,		
THE HON. CHARLES H. COOPER,		

**STATE EX REL. LYMAN, RELATOR, v. STEWART, GOVERNOR,
ET AL., RESPONDENTS.**

(No. 4,577.)

(Submitted March 8, 1920. Decided May 8, 1920.)

[190 Pac. 129.]

***States—Powers—Public Indebtedness—Terminal Grain Ele-
vators—Statutes—Constitution—Taxation.***

**States—Constitution—Power to Engage in Business of Operating Grain
Elevators.**

1. It not being prohibited from doing so by the Constitution, the state may, under its police power, lawfully engage in the business of operating a grain elevator or in other similar business for the benefit of the public.

**Same—Statutes—Terminal Grain Elevators—Constitution—Uniformity
Clause.**

2. *Held*, that Chapter 150, Laws of 1919, requiring a levy of a tax upon lands "agricultural in character" for the purpose of bond issues for the construction of terminal elevators, does not violate the uniformity clause of the Constitution.

Same—Taxation—Lands “Agricultural in Character”—Definition.

3. *Held*, that the words “agricultural in character” as used in section 4, Chapter 150, Laws of 1919, referring to lands subject to taxation for the purpose of creating the “terminal elevator fund,” are sufficiently definite and certain to enable assessing officers in determining what lands they shall list, the term meaning lands susceptible of being plowed and seeded or from which crops may be produced.

Statutes and Statutory Construction—Definition of Words.

4. Where words have, in the law, a well-defined meaning, their use in a statute, without specific definition, does not render the Act inoperative for uncertainty.

States—Creating State Debt—Taxation—Constitution.

5. Chapter 150, Laws of 1919, section 4, though needing revision, *held* not so defective as to render it unconstitutional under section 2, Article XIII, of the Constitution, which declares that when a state debt is created, provision shall be made for the levy of a tax for payment of the principal and interest.

Statutes—Constitutionality—Rule for Determining.

6. The constitutionality of a statute will be upheld unless it appears beyond a reasonable doubt that the Act is unconstitutional.

Statute and Statutory Construction—Surplusage.

7. Words in a statute which can be given no effect consistent with the plain intent of the statute, or words which, if given effect, may defeat the manifest purpose of the Act, should be eliminated or regarded as surplusage.

Terminal Elevator Statute—Tax Levy—Sufficiency—Legislative Question

8. Whether a tax levy provided by the legislature for the erection and maintenance of state owned terminal grain elevators is sufficient to meet the obligation of the state is a legislative question with which the court has nothing to do, and, in the absence of a showing of insufficiency, it will be presumed to be ample.

Original application for injunction by the State, on relation of E. F. Lyman, against Samuel V. Stewart, Governor, and others constituting the State Board of Examiners. Dismissed.

Messrs. Pray & Callaway, for Relator, submitted a brief; *Mr. Lew L. Callaway* argued the cause orally.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondents, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an original application for an injunction to restrain the respondent board of examiners from issuing and selling on behalf of the state bonds to the amount of \$250,000 in excess

of the constitutional limit and over and above any bonded indebtedness heretofore incurred by the state, authorized by Chapter 150 of the Laws of the Fifteenth Legislative Assembly, supplemented by Chapter 204 of the Laws of the Sixteenth Legislative Assembly, to procure funds for purchasing or building a terminal grain elevator, with the necessary equipment, at Great Falls, Montana, to be controlled and operated by the state and used for the storage and marketing of grain purchased in Montana. Chapter 150 in terms provides for the submission to the qualified electors of the state, at the following general election, of the question of the issuance of such bonds. So far as pertinent here, the following is an epitome of its provisions:

Section 1 authorizes the state board of examiners to issue bonds in the name of the state of Montana to the amount of \$250,000 for the purpose above specified.

Section 2 provides that the bonds shall be issued in denominations of \$1,000 each, that they shall become due in ten years from the date of their issuance, redeemable and payable, however, at the option of the state at any time after five years from the date thereof at any interest paying period, and that they shall bear interest at a rate of not to exceed five per cent per annum, payable semi-annually on June and December 15 of each year, at the office of the state treasurer.

Section 4 provides: "The state board of examiners shall make a charge of not more than two and one-half ($2\frac{1}{2}$) cents per bushel for grain stored in the terminal elevator and the money so received after paying the expense of maintaining the terminal elevator shall be paid into the state treasury and credited to a separate fund designated as the 'Terminal Elevator Fund,' and said fund shall be used exclusively for the payment of the interest and redemption of such terminal elevator bonds herein provided for. If the money so paid into the 'Terminal Elevator Fund' is not sufficient to pay the semi-annual interest on the bonds and the redemption thereof, then and in that event there shall be levied annually not exceeding one-half

($\frac{1}{2}$) of a mill on the dollar on all lands, agricultural in character, which said tax when collected by the county treasurer shall be accounted for and paid over to the state treasurer to be by the state treasurer held in the 'Terminal Elevator Fund,' which fund shall be used exclusively for the payment of the interest on such bonds and for the redemption thereof."

Section 5 directs that the county assessors of the several counties of Montana, commencing with the year in which the bonds are issued and continuing so long as such bonds, or any part of them, or any interest thereon, shall remain unpaid, shall designate upon the assessment-roll the lands subject to the tax.

Chapter 204 above (Laws 1919, p. 486), provides for the appointment of a board of managers for the elevator, prescribing their powers and duties, and providing for the location, construction, maintenance and operation of the elevator, and for the issuance of bonds by the state board of examiners under the authority conferred by the people by their vote under Chapter 150 at the general election in November, 1918. Section 5 is as follows: "Upon completion of such study and investigation and having decided upon a workable plan for the construction and successful operation of said terminal elevator and within sixty days after its organization, the board of managers shall notify the state board of examiners that it is ready to proceed with the construction of said terminal grain elevator. The said board of examiners of the state of Montana is hereby authorized and directed to proceed with the issuance and sale of bonds of the state of Montana to the amount of two hundred and fifty thousand (\$250,000) dollars for the purpose of constructing said terminal grain elevator with the necessary equipment at Great Falls, Montana, pursuant to the provisions of Chapter 150 of the Session Laws of the Fifteenth Legislative Assembly of the state of Montana, and the vote of the electors at the general election in November, 1918."

Section 10 directs that the money received from the storing and handling of grain, after the payment of the expense of maintaining and operating the elevator, including the salary

of the superintendent and expense of the board of managers and premiums on the bonds, shall be paid into the state treasury to the credit of the "Terminal Elevator Fund," and that this fund shall be used exclusively for the payment of the interest and principal of the elevator bonds.

On January 29 of this year the board, assuming to act under the provisions of Chapters 150 and 204, advertised the bonds for sale. On February 28 this action was brought to enjoin the issuance and sale of the bonds on the ground that the legislation referred to is unconstitutional. The attorney general interposed a general demurrer to the complaint. The controversy was thereupon submitted for final decision upon the questions of law thus raised.

1. It is not questioned by counsel for relator that the state [1] may lawfully engage in the business of operating a grain elevator or in other similar business for the benefit of the public, as distinguished from private business. Indeed, it could not be questioned, for the reason that there is no provision of the Constitution which prohibits it. In the absence of such provision, the legislature is left free to establish, and to provide by law for the conduct of, such a business so long as the plan adopted by it does not impinge upon some other provision or limitation in the Constitution or some one of the powers delegated by the people to the federal government. It is held that the state may establish such institutions under its police power. (*State ex rel. Lyon v. McCoun*, 92 S. C. 81, 75 S. E. 393; *Rippe v. Becker*, 56 Minn. 100, 22 L. R. A. 857, 57 N. W. 331.) Indeed, it is settled law in this jurisdiction that, subject to these limitations, the legislature possesses all the power of law-making which inheres in any independent sovereignty. (*State ex rel. Sam Toi v. French*, 17 Mont. 54, 30 L. R. A. 415, 41 Pac. 1078; *In re Pomeroy*, 51 Mont. 119, 151 Pac. 333; *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392; *Hulger v. Moore*, 56 Mont. 146, 182 Pac. 477.)

Section 1 of Article X of the Constitution declares that "educational, reformatory and penal institutions, and those for the benefit of the insane, blind, deaf and mute, soldiers' home, and such other institutions as the public good may require, shall be established and supported by the state in such a manner as may be prescribed by law." This language is broad enough in its scope to include any sort of an institution which the legislature in its discretion may determine the public good requires. Therefore, whether the authority of the legislature to establish and provide for the support of any public institution by the state is to be found in this clause of the Constitution or in its general police power, there can be no doubt that it exists.

2. It is suggested, though not seriously urged, that the [2] provision requiring the levy of the tax provided for on "lands agricultural in character" violates the uniformity provision of the Constitution. This question is, we believe, disposed of in this jurisdiction by the opinion in the case of *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554, and in *Hill v. Rae*, 52 Mont. 378, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495, 158 Pac. 826. In the first case noted this court said: "The state may classify persons and objects for the purpose of legislation, provided the classification is based upon justifiable distinctions, and for a purpose within the legislative power." In the second: "It does not follow, however, that the object in respect to which the classification is made must commend itself to 'certain preconceived and deeply rooted notions of lawyers' (*Cunningham v. Northwestern Improvement Co.*, *supra*), or that the classification must always depend 'on scientific or marked differences in things or persons or relations; it suffices if it is practical, and it is not reviewable unless palpably arbitrary.' "

There being a logical reason for assessing "lands agricultural in character" for the support of an institution which will directly benefit only the owners of such lands, the legislature

was acting within its constitutional power when it made the classification.

3. The next question presented is: Are the words "agricultural in character" sufficiently definite and certain to enable [3] the assessing officers of the state to determine what particular lands shall be listed for taxation? Relator insists that they are not, for the reason that the phrase used is not defined in the Act, "nor was there any Act, when Chapter 150 was passed, defining 'agricultural lands' throughout the state, to our recollection." Even if such were the case, we do not apprehend that it would be an unsurmountable difficulty, for "that is certain which can be made certain" (Rev. Codes, sec. [4] 6206), and if the term has, in the law, well-defined meaning, its use, without specific definition, would not render the Act inoperative for uncertainty.

Chapter 147 of the Laws of 1909 makes a specific classification of state lands, general throughout the state, which section was in effect at the time of the passage of the section in question, and which is based on a classification contained in our Constitution, to-wit: "Said lands shall be classified by the board of land commissioners, as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands. Fourth, lands within the limits of any town or city or within three miles of such limits." (Sec. 1, Art. XVII, Constitution of Montana.) Here the term "agricultural lands," which is synonymous with the term "lands agricultural in character," includes all lands of the state neither included within the limits of a town or city nor within three miles of such limits, lands valuable only for grazing purposes, and lands principally valuable for the timber on them, and, except for the special exclusion of lands which may be agricultural in character, lying within the three-mile limit of cities and towns, which has no application here, might well be taken as a guide for the classification under this Act.

The word "agricultural" is defined as pertaining to, connected with or engaged in agriculture. (Century Dictionary.) "The term 'agriculture' has been defined to be the 'art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, planting the seeds, the raising and harvesting the crops and the rearing, feeding, and management of livestock; tillage, husbandry, and farming.'" (2 Corpus Juris, 988, note b.) "It is equivalent to husbandry, and 'husbandry,' Webster defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, or fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces. * * * But in a more common and appropriate sense it is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast." (*Simons v. Lovell*, 7 Heisk. (Tenn.) 510-516.) A phrase having much the same meaning, under the California statutes, is "suitable for cultivation." This phrase was construed in the case of *Robinson v. Eberhart*, 148 Cal. 495, 83 Pac. 452, to include all land which, by ordinary farming methods, is fit for agricultural purposes.

It will be seen that the term "agricultural lands," or lands "agricultural in character," may be used in a broad or in a restricted sense, depending upon the intention of the legislature in the use of the term, and that the legislative intent expressed in the Act under consideration was that, as the Act was passed for the benefit of those owning lands susceptible of being plowed and seeded, or from which crops may be produced, under section 5 of Chapter 150, the assessing officers should list those lands within their jurisdiction, and only those, of the character indicated. Many tracts of land not now used for the purpose of raising grain are "susceptible" of being used for such purpose; hay lands and pasture lands, other than those "valuable only for grazing purposes," may produce crops.

Conceding the above to be the intention of the legislature, and following the constitutional and statutory provisions in

effect at the time of the passage of the Act, there should be no great difficulty experienced by the assessing officers, and no confusion as between the several counties of the state, and all lands listed as being subject to the tax in one county should, therefore, correspond to like assessment in each of the other counties.

4. It is next urged that the provisions of section 4 of the [5] Chapter, heretofore set out in full, do not meet the requirements of the Constitution as to the levying of taxes for the payment of the interest and the extinguishment of the debt within the specified time. It is contended that the means provided are inadequate, in that the section provides for the levying of a tax only in the event the receipts from the terminal elevator are not sufficient, after deducting running expenses, to meet the interest and provide the proper amount to be placed in the sinking fund.

Section 2 of Article XIII of the Constitution provides, in so far as applicable here, that "such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof."

Counsel cites a number of cases involving statutes creating a state debt without providing for the levying of such a tax, and where the court held the law to be unconstitutional. Without question, such a statute would be void under the above provision of our Constitution. But in Chapter 150, section 4 does provide for the levying of a tax for the purpose designated. Disregarding for the moment the provision for the payment of interest, *etc.*, from net proceeds of the terminal elevator, the phrase, "There shall be levied annually," *etc.*, is the phrase commonly employed in acts which do "provide for the levy of a tax," under the constitutional provision quoted, and, standing alone in this section, in conjunction with the provisions of section 5, which provides that "the county assessors of the counties in Montana, commencing with the year

wherein the bonds herein provided for may be issued and continuing so long as such bonds * * * may remain unpaid shall designate upon the assessment-rolls the lands subject to the tax in the foregoing section, provided for," and which makes no provision for a withholding on the part of the assessors until it shall be ascertained whether the net proceeds of the plant will take care of the matter, would give ample authority for saying that the legislature did "provide for" the tax and provide the power to make the assessment thereunder and to collect the tax on the lands subject thereto. Section 4 is, it is true, loosely drawn, and, to be effective, requires revision. The legislature should have first provided for the levy of the tax and then provided a method by which, if in any one year after the year in which the bonds are issued the net earnings in the terminal elevator fund shall be sufficient to meet the demands, the tax should not be collected for that year.

The rule is well settled in this jurisdiction that the court [6] will sustain the constitutionality of a law, unless it appears beyond a reasonable doubt to be unconstitutional. (*In re O'Brien*, 29 Mont. 530, 1 Ann. Cas. 373, 75 Pac. 196; *Northwestern Mut. Life Ins. Co. v. Lewis and Clark County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516; *Missouri River Power Co. v. Steele*, 32 Mont. 433, 80 Pac. 1093; *Spratt v. Helena P. & T. Co.*, 37 Mont. 60, 94 Pac. 631.) Under the head "Considerations Calling for Construction," the author on the subject, in 25 R. C. L., page 959, says: "If the statute under consideration appears to be in conflict with a provision of the Constitution, state or federal, there is an ambiguity; for it is always presumed that the legislature did not intend to violate either Constitution; it is always presumed it intended its enactments to become valid and enforceable laws. * * * Another occasion for construing a statute is where uncertainty as to its meaning arises not alone from ambiguity of the language employed, but from the fact that giving a literal interpretation of the words will lead to such unreason-

able, unjust, or absurd consequences as to compel a conviction that they could not have been intended by the legislature"—citing cases. Again, on page 868 of the same work, we find the rule that "the reason of the law, as intended by its general terms, should prevail over its letter, when the plain purpose of the Act will be defeated by strict adherence to its verbiage." And in section 225, page 974, it is stated that "courts cannot by construction supply *casus omissus* by giving force and effect to the language of the statute when applied to a subject about which nothing whatever is said, and which, to all appearances was not in the minds of the legislature at the time of the enactment of the law." But, while the court cannot add to or supply words or phrases to give to the statute some supposed intention of the legislature, [7] "when words occur in a statute which can be given no effect consistent with the plain intent of the statute, they must be rejected as without meaning. And words or phrases which, if given effect, might defeat the manifest purpose of the statute, will be eliminated or regarded as surplusage."

It must be presumed that the legislature intended to do its duty. That duty in the instant case was to provide for a levy of taxes to meet the interest and discharge the debt within the time provided. Clearly it did not intend that there should be a hiatus when these obligations would not be met, and we think, therefore, that from the loosely worded provisions of section 4 we can presume that the legislature intended, under any circumstances, that these obligations be met as they fall due, and, by following the rules of construction laid down, eliminate those provisions which would render the section uncertain, and, if sufficient remain to provide for the meeting of these obligations as they fall due, we can uphold the law in its modified form, though we cannot interpolate words into the statute.

Following these suggestions, we have the provision that "There shall be levied annually not exceeding one-half ($\frac{1}{2}$) of a mill on the dollar on all lands, agricultural in character, which said tax when collected by the county treasurer shall be

accounted for and paid over to the state treasurer to be by the state treasurer held in the 'Terminal Elevator Fund,' which fund shall be used exclusively for the payment of the interest on such bonds and for the redemption thereof." Section 5: "That the county assessors of the counties in Montana, commencing with the year wherein the bonds herein provided for may be issued and continuing so long as such bonds shall or any part thereof or any interest thereon may remain unpaid shall designate upon the assessment-rolls the lands subject to the tax in the foregoing section, provided for." And we have also the provision that the net proceeds from the elevator shall also be held in such "terminal elevator fund" for a like purpose, and that the provision for meeting these obligations out of the net proceeds of the elevator may be disregarded until such a time as the legislature may make suitable provision for the payment of the interest on the bonds and the discharge of the principal debt out of the surplus, if any there be, in said fund.

Whether the levy of one-half mill on the dollar is sufficient [8] to meet the obligation is a legislative question with which the court has nothing to do. (*State v. Holland*, 37 Mont. 393, 96 Pac. 719.) No showing is made that it will not be sufficient, and for the purposes of this hearing it must be presumed that it will be ample.

Other questions are raised in the complaint filed as to the constitutionality of the Act, but were conceded in argument to be without merit, and are therefore not considered.

In our judgment, the Act is not open to attack on the grounds urged, and the demurrer is therefore sustained, and the proceedings dismissed.

Dismissed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE, RESPONDENT, v. DIEDTMAN, APPELLANT.

(No. 4,398.)

(Submitted March 3, 1920. Decided May 8, 1920.)

[190 Pac. 117.]

*Criminal Law — Sedition — Jury — Challenges — Witnesses —
Hearsay—Cross-examination—Collateral Matters—Evidence—
Issues—Instructions.*

**Criminal Law—Selection of Jury—Peremptory Challenge by Trial Judge—
What may Constitute.**

1. Where a juror in a criminal prosecution had shown himself possessed of the statutory qualifications for jury service, a suggestion by the trial judge to the county attorney that if he would challenge the juror the challenge would be sustained, amounted to the exercise of a peremptory challenge—a right not possessed by such judge—was prejudicial error.

Same—Jury—Challenge for Cause may be Waived.

2. A challenge for cause may be waived, and is waived, unless availed of at the proper time.

Same—Selection of Jury—Right of Defendant.

3. A defendant is entitled to insist that the jury shall be selected according to law.

Same—Witnesses—Testimony to Support Character—When Inadmissible.

4. Testimony introduced in a prosecution for sedition, to support the good character of the state's chief witness before it had been impeached, was inadmissible under section 8026, Revised Codes.

Same—Reputation of Prosecuting Witness—Hearsay.

5. Testimony that the federal Department of Justice and the attorney general of the United States had investigated and passed favorably upon the record of a state witness, an ex-convict and alien enemy employed to detect violations of the sedition statute, was inadmissible as hearsay.

Same—Appeal and Error—Harmless and Harmful Error—How Determined.

6. No judgment will be reversed for technical errors or defects appearing in the record which do not affect the substantial rights of the complaining party, the question whether the particular error shall be classed as harmful or harmless depending upon the peculiar facts and circumstances in the particular case under review.

Same—Witnesses—Cross-examination—Impeachment on Collateral Matter.

7. Where a character witness for defendant had testified that the latter's reputation for honesty and integrity was good, it was error to require him to answer the question on cross-examination whether on previous occasions he had not used language indicating his pro-German sympathies; a witness not being subject to impeachment upon a collateral matter brought out on cross-examination.

Same—Cross-examination—Collateral Matter—Test.

8. The test by which to determine in a criminal prosecution whether a question asked a witness of defendant on cross-examination relates

to a collateral matter on which the witness' answer is conclusive, is whether the state could properly have introduced evidence on the subject in its case in chief.

Same—Witness Testifying from Memorandum—Cautionary Instruction.

9. *Held*, that where a witness testified to seditious language used by defendant, from a memorandum extended by the former from notes made by him when the statements were said to have been made, refusal to instruct the jury to receive such testimony with caution was error, defendant having been entitled to such an instruction under section 8020, Revised Codes, as a matter of absolute right.

Same—Detectives—Cross-examination—Undue Restriction.

10. Where the state's principal witness in a prosecution for sedition, a detective, was an alien enemy, self-confessed forger and ex-convict, who had been in this country but a comparatively brief period, it was prejudicial error to restrict his cross-examination; in such cases a broad liberality of cross-examination should be indulged.

Same—Sedition—Issues—Jury Questions.

11. In a prosecution under Chapter 11, Laws Extra. Session of 1918, for making seditious utterances, the plea of not guilty put in issue not only the question whether defendant had used the language charged, but whether, if used, it was calculated to bring the form of government, the Constitution, army and navy into contempt, scorn and disrepute—a fact to be determined by the jury.

Same—Sedition—Issues—Definition—Instructions.

12. Failure of the trial court to define the issues involved in a prosecution for sedition as set forth above (paragraph 11) in its instructions to the jury, or to advise them that it was necessary to a conviction that the state prove beyond a reasonable doubt that defendant uttered the objectionable language and that such language was calculated to have the effect charged in the information, was error, as was also the giving of an instruction that they could find defendant guilty if he had at any time between a certain date and the filing of the information done any of the things condemned by the Sedition Act.

*Appeal from District Court, Lewis and Clark County;
R. Lee Word, Judge.*

TONY DIEDTMAN was convicted of sedition, and from the judgment and an order denying his motion for a new trial he appeals. Reversed and remanded.

Mr. Henry C. Smith, for Appellant, submitted a brief and argued the cause orally.

The information does not state, and the prosecution did not prove, facts sufficient to constitute a public offense. The language attributed to the defendant was not seditious. (*State v. Kahn*, 56 Mont. 108, 182 Pac. 107; *Schenck v. United States*, 249 U. S. 47, 63 L. Ed. 470, 39 Sup. Ct. Rep. 247; *Frohwerk*

v. *United States*, 249 U. S. 204, 63 L. Ed. 561, 39 Sup. Ct. Rep. 249; *Debs v. United States*, 249 U. S. 211, 63 L. Ed. 566, 39 Sup. Ct. Rep. 252; *State v. Griffith*, 56 Mont. 241, 184 Pac. 219; *State v. Wolf*, 56 Mont. 493, 185 Pac. 556; *Rex v. Trainer, Alberta*, 27 Canadian Crim. Cas. 232.)

An attempt was made by the state to give the witness Von Waldru a character for truth, honesty and veracity, in advance of his testimony and before his character had been impeached. This was reversible error. (*Morgan v. State*, 88 Ala. 223, 6 South. 761; *Hamilton v. Conyers*, 28 Ga. 276; *Magee v. People*, 139 Ill. 138, 28 N. E. 1077; *Clackner v. State*, 33 Ind. 412; Starkie on Evidence, 8th Am. ed. 222; *State v. Thomas*, 78 Mo. 327; 5 Am. & Eng. Ency. of Law, 2d ed., p. 852; Rev. Codes, secs. 8026, 9482.)

The defendant was tried twice on the same information; the jury in the first trial disagreed and were discharged in the absence of the defendant. At the opening of the second trial the defendant interposed a plea of "once in jeopardy." In instructing the jury the court directed them to find a verdict for the state upon this plea. It should have directed it to find the issue in favor of the defendant, and to acquit him. (Const., sec. 16, Art. III; 12 Cyc. 270; *Maden v. Emmons*, 83 Ind. 331; *State v. Wilson*, 50 Ind. 487, 19 Am. Rep. 719; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *State v. Sommers*, 60 Minn. 90, 61 N. W. 907.)

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

In order to permit the introduction of testimony showing the good character and reputation of a witness, it is not necessary that such character and reputation should be directly assailed or attacked by the other side by witnesses testifying that such character or reputation is bad, but such attack may be made by cross-examination of the witness by means of the substance of questions and the manner of propounding them;

and when so attacked and assailed the party introducing such witness may then introduce testimony to show that the character or reputation of such witness is good (40 Cyc. 2643; *State v. Fruge*, 44 La. Ann. 165, 10 South. 621; *Warfield v. Louisville & N. Ry. Co.*, 104 Tenn. 74, 78 Am. St. Rep. 911, 55 S. W. 304; *Harris v. State*, 49 Tex. Cr. 338, 94 S. W. 227; *La Follette Coal etc. Co. v. Minton*, 117 Tenn. 415, 11 L. R. A. (n. s.) 478, 101 S. W. 178; *Chesapeake & Ohio Ry. Co. v. Fortune*, 107 Va. 412, 59 S. E. 1095; *Wick v. Baldwin*, 51 Ohio St. 51, 36 N. E. 671); and bringing out on cross-examination that a witness has been convicted of a felony is such an attack on the character and reputation of a witness as will justify the introduction of evidence to sustain his character or reputation for truth, honesty and veracity. (40 Cyc. 2644; *Gertz v. Fitchburg Ry. Co.*, 137 Mass. 77, 50 Am. Rep. 285; *People v. Amanacus*, 50 Cal. 233; *Derrick v. Wallace*, 217 N. Y. 520, 112 N. E. 440; *Kraimer v. State*, 117 Wis. 350, 93 N. W. 1097; *Missouri, K. & T. Ry. Co. v. Dumas* (Tex. Civ.), 93 S. W. 493; *Missouri, K. & T. Ry. Co. v. Adams*, 42 Tex. Civ. 274, 114 S. W. 453; *Shields v. Conway*, 133 Ky. 35, 117 S. W. 340.)

It is probable that the testimony may not have been proper at the time it was introduced. But no objection was made because introduced out of order,—in fact, counsel for defendant expressly stated that no objection was made to the order of testimony, but merely to its competency. Having thus waived any objection to its introduction by reason of its being out of order, the cross-examination of the witness Von Waldru, when he was placed on the stand, rendered the testimony of these two witnesses proper and competent to sustain the character and reputation of the witness. Counsel for defendant by his own examination of Von Waldru cured any error the court may have committed in permitting this testimony to be introduced. (*Butte Consol. Min. Co. v. Barker*, 35 Mont. 327, 89 Pac. 302, 90 Pac. 177; *State v. Dumphy* (Mont.), 187 Pac. 897; 4 Corpus Juris, 815, 816.)

If defendant had not waived his right to be present at the time the jury was discharged, it is possible that his plea of "once in jeopardy" might be sustained, although the authorities do not uniformly so hold, but it clearly appears from the minutes that the defendant waived his right to be present, consequently there is no merit in such plea. (*People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *State v. White*, 19 Kan. 445, 27 Am. Rep. 137; *State v. Vaughan*, 29 Iowa, 286; *Varnes v. State*, 20 Tex. App. 107; *People v. Greene*, 100 Cal. 140, 34 Pac. 630; *Frank v. Mangum*, 237 U. S. 309, 62 L. Ed. —, 35 Sup. Ct. Rep. 582; *Garland v. Washington*, 232 U. S. 642-645, 58 L. Ed. 772, 34 Sup. Ct. Rep. 456 [see, also, *Rose's U. S. Notes*]; *Rex v. Richardson*, [1913] 1 K. B. 395; 8 R. C. L., Crim. Law, secs. 148, 150; 16 C. J., Crim. Law, sec. 2568, p. 1095.)

Opinion—PER CURIAM.

By an information filed in the district court of Lewis and Clark county on May 31, 1918, the defendant was charged with the crime of sedition. Upon his first trial the jury failed to agree upon a verdict. The second trial resulted in a verdict of guilty, with a recommendation to the mercy of the court. The defendant was sentenced to imprisonment in the penitentiary for a term of not less than ten years nor more than twenty years, and has appealed from the judgment and from an order denying his motion for a new trial. There are forty-seven assignments of error, but the contentions made upon some of them have been determined adversely to defendant in sedition cases recently decided. The other assignments may be considered in groups.

1. Henry Latch, a jurymen, was examined on his *voir dire* by [1,2] the county attorney at some considerable length, when the court interposed with the remark that, "if counsel will challenge this juror, I will sustain the challenge." The suggestion was availed of, the juror challenged and excused, and exception was taken to the remark of the court, as well as to

the ruling. There was not any intimation contained in the evidence that the juror was disqualified; on the contrary, he had shown himself possessed of the statutory qualifications for jury service. Neither do we think that the record discloses sufficient ground for challenge for cause; but, even if it did, any ground for such challenge may be waived, and is waived unless availed of at the proper time, and in this instance, if the county attorney had not seen fit to interpose a challenge for cause, the competency of the juror to sit in the trial of the cause could not be questioned. To all intents and purposes, the action of the court amounted to the exercise of a peremptory challenge by it—a right which the court does not possess. (16 R. C. L. 253.) If the court can, of its own motion, excuse one juror without cause, it can excuse a dozen, or, in other words, it can so far pick the jury in advance of the exercise of the peremptory challenges as to compel the defendant to submit to trial before a jury satisfactory to the court, with the only alternative to him to make use of his peremptory challenges among jurors all of whom are equally objectionable.

The statute prescribes the method of selecting a jury, [3] including the challenges and the mode of their exercise, and neither the court nor the parties can select it in any other manner. To admit of any substantial departure from the statutory method would, in effect, nullify the statute itself. In *People v. McQuade*, 110 N. Y. 284, 1 L. R. A. 273, 18 N. E. 156, it is said: "The legal right of a defendant may be violated as well by excluding competent jurors as by admitting incompetent ones. He is entitled in all cases to a fair and impartial jury, but he is also entitled to insist that the jury shall be selected according to methods established with a view to secure a just and impartial administration of the jury system." To the same effect are *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264; *Van Blaricum v. People*, 16 Ill. 364, 63 Am. Dec. 316; *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 21 Am. St. Rep. 629, 11 L. R. A. 233, 47 N. W. 562.

But the error was made more manifest by the manner of the court than by the ruling itself. The remark, considered in connection with the testimony given by the juror, must have led the remaining jurors to believe that the court entertained prejudice against any venireman who manifested a friendly disposition toward the defendant, even though no such prejudice was entertained in fact.

We approve the holding of this court in *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132; but the facts upon which that case was decided differ materially from the facts of the instant case. In that case the juror excused was not a citizen of the United States, and upon his *voir dire* examination testified that he had formed an opinion as to the guilt or innocence of the accused. He was challenged by the prosecution and the challenge allowed. The court did not go further than to hold that "the appellant was not injured by the exclusion of the juror."

2. The county attorney first called as witnesses John Berkin [4, 5] and Thomas Topping, and interrogated them concerning their acquaintanceship with one Eberhard Von Waldru, whose name was indorsed upon the information as a witness for the state. Each witness testified that he knew the reputation of Von Waldru for truth, honesty and integrity in the neighborhood where he resided, and that it was good. Over the most vigorous objection of defendant's counsel, Topping was then permitted to testify that the Department of Justice at Washington and the attorney general of the United States had investigated Von Waldru's record, and that they had passed favorably upon it.

Section 8026, Revised Codes, prohibits the introduction of supporting evidence of the good character of a witness until his character has been first impeached, unless his character is in issue; but assuming that an objection to the order of proof was waived—and it was waived as to one of the witnesses at least—or that error may not be predicated upon the court's rulings admitting this character evidence before Von Waldru had testified, the only evidence admissible under any conceiv-

able circumstances was evidence of Von Waldru's general reputation in the neighborhood where he lived. (*Silver Bow M. & M. Co. v. Lowry*, 6 Mont. 288, 12 Pac. 652.) The evidence that the Department of Justice had investigated Von Waldru's record and had passed favorably upon it was the veriest hearsay, and its admission violated the most elementary rules of the law of evidence.

That it was error to admit this evidence is not open to controversy, and the only question for determination is: Was the error a material one under the circumstances? The rule is [6] now firmly established in this jurisdiction that no judgment shall be reversed for technical errors or defects appearing in the record, which do not affect the substantial rights of the complaining party. There is no hard-and-fast rule by which to determine whether a particular error shall be classed as harmful or harmless. Every case must be determined upon its own peculiar facts and circumstances. What are the circumstances of this case which reflect upon the question?

There was no one present when the alleged seditious remarks were made, but Von Waldru and the defendant, and therefore the state was compelled to rely upon Von Waldru's testimony alone to establish the fact that the words were spoken. Von Waldru admitted that he was an alien enemy, a former officer in the German army, a former convict, who had completed his term in the penitentiary at Deer Lodge about the middle of November, 1917. The necessity of bolstering up Von Waldru's testimony was apparent, and appreciated fully by the county attorney; but neither Berkin nor Topping had known him for a period as long as six months, one-half of which time Von Waldru had spent in Butte, a portion of the remainder in Helena, and the other portion not accounted for. Just how either Berkin or Topping could gain a knowledge of the general reputation of Von Waldru during so short a period, or how Von Waldru could establish a general reputation among the people of a community by such a peripatetic residence, are questions which we need not stop to consider at length. In

Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33, this court said: "Reputation can be proven only by the testimony of witnesses who, by association and acquaintance in the community where the person whose reputation is in question resides, know what is there said of him, and who can, from such knowledge, express an opinion thereon."

Assuming that Berkin and Topping each was competent to answer the question propounded to him, and that his brief acquaintanceship affected only the weight to be given to his opinion (*Territory v. Paul*, 2 Mont. 314), it must be manifest that under these circumstances the jury could not have given much weight to the expressed opinion that Von Waldru's reputation for truth, honesty and integrity was good. The defendant denied categorically that he ever made any of the statements attributed to him by Von Waldru and produced several witnesses, each of whom testified to his good reputation; but notwithstanding these facts, and the fact that Von Waldru was a self-confessed forger and an ex-convict, out of the penitentiary only eight months before he gave his testimony upon the trial of this case, the jury were led to say by their verdict that beyond a reasonable doubt the defendant had used the words as Von Waldru had testified that he did. There must have been some consideration which led the jury to this conclusion, other than Von Waldru's testimony standing alone. It could not have been the sustaining testimony of Berkin and Topping, for the opinion of neither could have had much weight, under the meager showing of the facts upon which it was based. But it is easily conceivable that a jury of laymen would be impressed profoundly by the favorable findings of the Department of Justice at Washington and the attorney general, after an investigation into Von Waldru's history, and we think that it is fairly inferable from this record that the verdict rests largely, if not altogether, upon the support which Von Waldru's reputation received from this hearsay testimony; at any rate, it cannot be said that the error in admitting it was without prejudice.

3. A witness, Reiss, called by the defendant, testified upon [7] his direct examination that defendant's reputation for honesty and integrity was good. Upon cross-examination, the county attorney was permitted, over objection, to inquire of the witness whether he had not on a previous occasion, or on previous occasions, used language indicating his pro-German sympathies. The witness denied the implication, and upon rebuttal the state was permitted to introduce a witness to impeach Reiss by testimony that he had used the language attributed to him in the county attorney's questions. The error in the court's rulings is manifest. Reiss was not on trial, and, if he had used the language, it could not reflect in the least upon the guilt or innocence of Diedtman. It is elementary that a witness cannot be impeached upon a collateral matter brought out on cross-examination. (*Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761.) The rule is stated in Wharton's Criminal Evidence, section 484, as follows: "When a witness is cross-examined on any irrelevant matter, or any matter collateral to the issue, his answers are conclusive, and he cannot be subsequently contradicted on those matters by the party seeking to impeach him."

The test to be applied in this instance to determine whether [8] the matter was collateral is this: Would the county attorney have been entitled to prove that Reiss made the statements as a part of the state's case in chief? That he would not is manifest. This subject has received the consideration of this court in the recent case of *State v. Smith*, 57 Mont. 349, 188 Pac. 644, and a like ruling was condemned.

4. It appeared from the testimony of Von Waldru that he [9] made notes at the time of Diedtman's statement, and soon thereafter extended these notes in a memorandum which he produced upon the trial. During the course of his examination he stated repeatedly that, in order to give the language employed by Diedtman, it was necessary for him to use the memorandum. At the conclusion of the evidence counsel for

the defendant requested the court to give the following instruction: "If you find that the witness Von Waldru cannot recollect the particular words used by the defendant on April 26, 1918, and requires his memorandum thereof in order to testify thereto, then I charge you that such evidence should be received with caution." The request was refused, no instruction upon the subject was given, and error is predicated upon the ruling. The instruction is in harmony with the provisions of section 8020, Revised Codes. That statute but crystallizes rules of evidence recognized generally by the text-writers and applied by the courts of this country for a century before the statute was adopted. It recognizes two classes of subjects to which the rules are applicable. In the first class is the witness who, by referring to his memorandum, has his memory quickened so that he is able to testify from his actual recollection. The second class includes the witness who undertakes to testify to facts, not because of his independent recollection of them, but relying for his confidence in the assumed correctness of the memorandum itself. (*Davis & Whitaker v. Field*, 56 Vt. 426). Recognizing the possibility of error in the memorandum, and the fact that the opposite party is practically precluded from testing its accuracy, the statute has wisely declared that the testimony of a witness of this latter class shall be received by the jury with caution. Whether the witness Von Waldru belonged to the one class or the other was, under the circumstances, a question for the jury to determine, and if they had found that he belonged to the second class, the right of the defendant to have the jury instructed to receive his testimony with caution was absolute, and the refusal of the instruction was error. When it is recalled, as heretofore stated, that the state relied altogether upon Von Waldru's testimony to prove that the statements were made by the defendant, and that it was deemed necessary by the county attorney to bolster up that testimony, even before it was given, by evidence of Von Waldru's good reputation, notwithstanding his previous history,

the error in refusing the cautionary instruction is but emphasized.

5. Errors are predicated upon rulings of the court restricting [10] defendant's cross-examination of the witness Von Waldru. The assignments upon this subject are too numerous to be treated separately. We think the court erred to defendant's prejudice. Von Waldru was a detective employed for hire to ferret out violations of the sedition statute. He had been in America but a comparatively brief period, and defendant's only means of ascertaining his credibility, or lack of it, was by cross-examination, and a broad liberality in this respect should have been indulged. In *State v. Whitworth*, 47 Mont. 424, 133 Pac. 364, this court said: "The purpose of trials of issues of fact is to bring out the whole truth, and to that end the right of cross-examination must be liberally interpreted and freely exercised." The language of the court in *State v. Wakely*, 43 Mont. 427, 117 Pac. 95, is particularly pertinent here. It was there said: "We recognize the duty of trial judges to allow the utmost latitude on cross-examination, especially in cases like this, where the question of the guilt or innocence of a citizen depends entirely upon the credit to be given to witnesses hired to detect violators of the statute."

6. Finally, and aside from every other consideration, the [11,12] record discloses that the case was tried throughout upon an entirely erroneous theory of the statute defining sedition. The court must have proceeded upon the theory that, if the defendant used the language set forth in the information, he was guilty. But this does not follow as of course. The language may have been used, even in time of war, under such circumstances that no crime would have been committed. As observed by this court in the case of *State v. Smith*, 57 Mont. 563, 190 Pac. 107, our Sedition Act in its general scope and purpose is not unlike the federal espionage law, and concerning a prosecution under that Act the supreme court of the United States said: "The question in every case is whether

the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." (*Schenck v. United States*, 249 U. S. 47, 63 L. Ed. 470, 39 Sup. Ct. Rep. 247.)

The information in this instance charges that the language used by the defendant was *calculated* to bring the form of government, the Constitution, the soldiers and sailors, the flag and the uniform into contempt, scorn, contumely and disrepute. This was a necessary allegation under the subdivision of the statute here involved. The defendant's plea of not guilty put that allegation in issue, and devolved upon the prosecution the burden of proving it by competent evidence, beyond a reasonable doubt. Whether the language, if used, was calculated to have the effect imputed to it in the information, was a question of fact to be determined by the jury. (*State v. Kahn*, 56 Mont. 108, 182 Pac. 107.) The court did not give any instruction defining the particular issues involved in this case. Nowhere were the jury told that it was necessary to a conviction that the state prove beyond a reasonable doubt that the defendant had used the language set forth in the information, nor were the jury instructed that they must further find that the language so set forth, if used by the defendant, was calculated to bring the form of government of the United States, the Constitution, the soldiers or sailors, the flag or uniform into contempt, scorn, contumely or disrepute; but, on the contrary, the court gave instruction No. 4, under which the jury were authorized to find the defendant guilty if the evidence established beyond a reasonable doubt that he had at any time between February 22, 1918, and May 31, 1918, the date of filing the information, done any of the acts or things condemned by the statute defining sedition, without reference to the particular charge contained in the information. This question also was considered in the case of *State v. Smith*, above, and need not be elaborated any further.

For the reasons given, the judgment and order are reversed, and the cause is remanded to the district court of Lewis and Clark county for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

WILLIS, RESPONDENT, v. PILOT BUTTE MINING CO. ET AL.,
APPELLANTS.

(No. 4,542.)

(Submitted April 10, 1920. Decided May 8, 1920.)

[190 Pac. 124.]

*Master and Servant—Death by Assault—Compensation Act—
Constitution—Jurisdiction—Industrial Accident Board—
Findings—Review.*

Master and Servant—Compensation Act—Appeal to Supreme Court—
Trial *De Novo*—Unconstitutional Provision of Act.

1. To the extent that section 22(d) of the Compensation Act (Chap. 96, Laws 1915) attempts to confer jurisdiction upon the supreme court to try *de novo*, in the sense that a case appealed to the district court from a justice's court is tried anew, a case appealed to it from the district court and brought into that court on appeal from an award made by the Industrial Accident Board, it is invalid as a violation of sections 2 and 3, Article VIII, Constitution.

Same—Appeal to District Court—Jurisdiction.

2. *Held*, that while section 22(b) of the Compensation Act provides that on appeal to the district court from an award of the Industrial Accident Board the trial shall be *de novo*, the power thus given is that of review rather than that of retrial.

Same—Findings of District Court—When Conclusive.

3. On appeal from an award made under the Compensation Act, after review by the district court, the supreme court will not reverse the findings of that court unless the evidence clearly preponderates against them.

On recovery of compensation under Workmen's Compensation Acts, where workman suffers injury from assault, see notes in L. R. A. 1916A, 306, and L. R. A. 1918E, 498.

Same—Death of Employee by Assault—When Injury Arising Out of Employment.

4. *Held*, that while injuries received by an employee during a personal altercation with a co-worker, in no way connected with his duties, do not give rise to a claim for compensation under Chapter 96, Laws of 1915, where a mine foreman killed a station-tender in a fit of anger because deceased had signaled the engineer to hoist the cage upon which they were riding to the surface instead of to a certain level in the mine, the death arose out of the employment, and that therefore his widow was properly allowed compensation.

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

PROCEEDINGS under the Workmen's Compensation Act by Martha Willis against the Pilot Butte Mining Company, employer, and the Aetna Life Insurance Company, insurer. Compensation was awarded by the Industrial Accident Board, the award affirmed by the district court, and from its judgment the employer and insurer appeal. Affirmed.

Messrs. Frank & Gaines, for Appellants, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

The burden was upon Martha Willis to show that the injury arose out of the employment. (*Union Sanitary etc. Co. v. Davis* (Ind. App.), 115 N. E. 676; *Ohio etc. Vault Co. v. Industrial Board*, 277 Ill. 96, 115 N. E. 149; *Wiggins v. Industrial Acc. Board*, 54 Mont. 335-342, Ann. Cas. 1918E, 1164, L. R. A. 1918F, 932, 170 Pac. 9.) "But the claimant fails if an inference favorable to him can only be arrived at by a guess; likewise when two or more conflicting inferences equally consistent with the facts arise from them." (*Ohio etc. Vault Co. v. Industrial Board*, *supra*.) The same rule is equally applicable to proceedings before the board. (Honnold on Workmen's Compensation, sec. 230, pp. 795, 796, and cases there cited.)

The weight of authority, both numerically and according to logical reasoning, is to the effect that injury due to assault is as a rule not compensable; the allowance of compensation is always the result of the existence of some one or more of sev-

eral well-recognized exceptions. Ordinarily assaults are not considered as either industrial accidents or as arising out of the employment as the latter phrase is construed. The instances of injuries flowing from assaults are always traceable either to assaults arising from ill will or out of unlawful conduct (which we will later denominate "Intentional Assaults"), or to assaults as a result of playfulness, skylarking or pranks. The "Intentional Assault" cases naturally include assaults both by fellow-employees and third persons.

The American cases, grouped as above suggested, are the following: "Intentional Assaults: Group A—Assaults by fellow-employees. Legend: (a) Recovery allowed. (d) Recovery denied: (a) *McNicol v. Patterson etc. Co.*, 215 Mass. 497, L. R. A. 1916A, 306, 102 N. E. 697; (a) *Cranney's Case*, 232 Mass. 149, 122 N. E. 266; (a) *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398; (a) *San Bernardino v. Industrial Acc. Board*, 35 Cal. App. 33, 169 Pac. 255; (a) *Polar Ice & Fuel Co. v. Mulray* (Ind. App.), 119 N. E. 149; (a) *In re Heitz v. Ruppert*, 218 N. Y. 148, L. R. A. 1917A, 344, 112 N. E. 750; (a) *Carbone v. Loft*, 219 N. Y. 579, 114 N. E. 1062; (d) *Metropolitan etc. Co. v. Industrial Acc. Board* (Cal. App.), 182 Pac. 315; (d) *Union Sanitary Mfg. Co. v. Davis* (Ind. App.), 115 N. E. 676; (d) *Walther v. American Paper Co.*, 89 N. J. L. 732, 99 Atl. 263; (d) *Mountain Ice Co. v. McNeill*, 91 N. J. L. 528, 103 Atl. 184; (d) *Griffin v. Roberson & Son*, 176 App. Div. 6, 162 N. Y. Supp. 313; (d) *Stillwagon v. Callan Bros.*, 183 App. Div. 141, 170 N. Y. Supp. 677; (d) *Clark v. Clark*, 189 Mich. 652, 155 N. W. 507; (d) *Marshall v. Baker etc. Co.* (Mich.), 173 N. W. 191; (d) *Jacquemin v. Turner etc. Mfg. Co.*, 92 Conn. 382, 103 Atl. 115; (d) *Pierce v. Boyer etc. Coal Co.*, 99 Neb. 321, L. R. A. 1916D, 970, 156 N. W. 509; (a) *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530; (a) *Chicago, R. I. & P. Ry. Co. v. Industrial Com.*, 288 Ill. 126, 123 N. E. 278; (a) *Swift & Co. v. Industrial Com.*, 287 Ill. 564, 122 N. E. 796.)

Group B—Assaults by Third Persons: (a) *In re Reithel*, 222 Mass. 163, 109 N. E. 951; (a) *Hellman v. Manning etc. Co.*, 176 App. Div. 127, 162 N. Y. Supp. 335; (a) *State ex rel. Anseth v. District Court*, 134 Minn. 16, L. R. A. 1916F, 957, 158 N. W. 713; (a) *Chicago Dry Kiln Co. v. Industrial Board*, 276 Ill. 556, Ann. Cas. 1918B, 645, 114 N. E. 1009; (a) *Ohio etc. Vault Co. v. Industrial Com.*, 277 Ill. 96, 115 N. E. 149; (a) *Baum v. Industrial Com.*, 288 Ill. 516, 123 N. E. 625; (a) *Emerick v. Slavonian etc. Union* (N. J.), 108 Atl. 223; (d) *Harbroe's Case*, 223 Mass. 139, L. R. A. 1916D, 933, 111 N. E. 709; (d) *Muller v. Cohen*, 186 App. Div. 845, 174 N. Y. Supp. 736; (d) *State ex rel. Common School Dist. v. District Court*, 140 Minn. 470, 168 N. W. 555; (d) *Schmoll v. Weisbrod etc. Brewing Co.*, 89 N. J. L. 150, 97 Atl. 723.)

Assaults Committed in Play: (d) *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, L. R. A. 1916F, 1164, 158 Pac. 212; (d) *Fishing v. Pillsbury*, 172 Cal. 690, 158 Pac. 215; (d) *Hulley v. Moosbrugger*, 88 N. J. L. 161, L. R. A. 1916C, 1203, 95 Atl. 1007; (d) *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, L. R. A. 1916D, 968, 156 N. W. 143; (d) *In re Moore*, 225 Mass. 258, 114 N. E. 204; (d) *Stuart v. Kansas City*, 102 Kan. 307, 563, 171 Pac. 913; (d) *Tarpper v. Weston etc. Co.*, 200 Mich. 275, 166 N. W. 857; (d) *De Filippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761; (a) *In re Loper* (Ind.), 116 N. E. 324; (a) *State ex rel. Johnson etc. Co. v. District Court*, 140 Minn. 75, 167 N. W. 283; (a) *Knopp v. American etc. Co.*, 186 Ill. App. 605.)

A consideration of this grouping of the cases discloses that the allowance or denial of recovery does not depend upon whether the assault be intentional or playful, or be committed by a fellow-employee or by a stranger to the work. The test, of course, is as defined in the *Wiggins Case*, *supra*. In all of the cases above listed, that the injury occurred in the *course of the employment* has been accepted as an established fact; in most of them there is express recognition that an assault may be an accident connected with industry; and in all of

them the question controlling was whether the assault, with its resulting injury, arose "*out of the employment.*"

And in all cases of allowance of recovery the particular resulting injury has been shown to be, and been held to fall, fairly within one or more of several well recognized and clearly defined exceptions to the general rule that injuries resulting from assaults are not compensable. These exceptions are grounded upon the proposition that the particular conditions under which the employment is pursued, or the nature of the employment make the chance of an assault a risk peculiar to the work that the particular employee is called upon to perform. And it is most important to a correct understanding of the question presented to note that in the consideration of the applicability of any exception, it is the status of the applicant for compensation that is controlling, not the status of the one occasioning the injury.

The exceptions above mentioned are the following: (Class A:) The existence, with the knowledge of the employer, of working conditions or practices indulged in, which subject the employee to such a risk of assault as that it may be said to be reasonably incident to the work the injured employee is called upon to perform under the circumstances. (Class B:) The furthering of an employer's interests by superior servants in the line of their employment, as in the matter of enforcing discipline or obedience to rules of the employer; and in holding other employees to account for property of the employer intrusted to their care. (Class C:) Performing a character of service which may be said to invite the danger of assault,—as for instance, cashiers, paymasters, night watchmen and the like. (Class D:) Protection of the property of the employer from injury threatened by lawless acts, fires and the like.

Mr. H. A. Tyvand, for Respondent, submitted a brief and argued the cause orally.

The appellants have grouped assaults under two general heads, to-wit: 1. "Assaults committed in play," 2. "Intentional

assaults," which they subdivided into two heads, to-wit: (a) "Assaults by fellow-employees," (b) "Assaults by third persons." They then cover about forty pages of their brief on this classification or on the exceptions they present thereunder. By an examination of the facts in this case, it is clearly evident that this classification has no application, because this is a case of an assault by a master (vice-principal, Mr. Brooks, night foreman, a man who stands in the master's shoes) upon a servant. In this class of cases of assault by a vice-principal upon a servant, or *vice versa*, all the cases we have found have allowed compensation in favor of the persons assaulted. On the other hand, in not one of the cases cited by appellants where compensation was denied under the above heading, 2(a), is there a case of an assault by a vice-principal on a servant, or *vice versa*.

The evidence shows Willis was assaulted because he was station-tender at the mine, and not because he was Willis. The assault was not made by a personal enemy to avenge a personal wrong about a purely personal matter. From this it is apparent that Mr. Willis' injury arose out of the employment. When we take into consideration all the surrounding circumstances, the facts in the instant case are practically the same as those in the case of the *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, often known as the *Rudder Case*. The California Compensation Law is practically word for word the same as the Montana Compensation Law on the question before this court.

In the *Rudder Case*, the section foreman went to one of his employees, a section-hand, who was not doing his work in a proper way, took the shovel from Pappas' hand and showed him how to do the work, but Pappas continued to do the work in his same old way. In both of these cases (the *Rudder* and this case) the trouble was about the work of the employees, between foreman and employee under him. The foreman in each case was the aggressor. The two cases are as near alike as can be without being identically the same.

The *Rudder Case* is affirmed in *San Bernardino County v. Industrial Acc. Com.*, 35 Cal. App. 33, 169 Pac. 255, in which an employee was the aggressor and a foreman the injured party. (See, also, *Polar Ice etc. Co. v. Mulray* (Ind. App.), 119 N. E. 149.) The following are some of the cases similar to the one at bar, in each of which compensation was allowed: *Swift & Co. v. Industrial Com.*, 287 Ill. 564, 122 N. E. 796, where a foreman assaulted an employee, a pipe-fitter, for not obeying his orders; *Cranney's Case*, 232 Mass. 149, 122 N. E. 266, a case of an assault by a waiter on the head-waiter about orders which resulted in his discharge; *Carbone v. Loft*, 219 N. Y. 579, 114 N. E. 1062,—this is a case where two employees were arguing about their work. About three-quarters of an hour later, one of the employees assaulted the other; *McNicol's Case*, 215 Mass. 497, L. R. A. 1916A, 306, 102 N. E. 697, a case of one employee assaulting another employee; *Pekin Cooperage Co. v. Industrial Com.*, 285 Ill. 31, 120 N. E. 530, a case of assault of one employee upon another, because one employee took some barrel staves from another, which they were working with; *Chicago etc. Ry. Co. v. Industrial Com.*, 288 Ill. 126, 123 N. E. 278, a case of a locomotive boiler-washer being assaulted by his helper after the helper had been discharged.

The appellants contend that the cases of assault do not come under the compensation law unless it is a case coming under at least one of their four exceptions to their classification hereinbefore mentioned. In examining these four exceptions set up by the appellants we clearly see that the instant case easily comes within at least three of these exceptions, even though it is not necessary to come within any of these exceptions in order to recover compensation, because the cases coming under these exceptions are not the only cases where compensation is allowed. The question whether or not an injury (from a fortuitous event) arose out of the employment of a person depends upon about as many circumstances as there are cases arising. It is a question of fact for the industrial accident boards and

courts to decide from the facts under the circumstances in each case whether or not the injury arose out of the employment.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On March 20, 1916, W. A. Willis, while employed as station-tender for appellant mining company, was shot by Nathan Brooks, mine foreman for said company, and thereafter died. Willis was subject to the provisions of the Workmen's Compensation Act, and respondent, for herself and her minor child, filed with the Industrial Accident Board her proof of injury and death, and application for compensation. Two separate hearings were had before the board, and on August 30, 1919, award was made in accordance with the application. The company and its insurance carrier appealed to the district court of Silver Bow county, and, after a hearing, the court found in favor of respondent and entered judgment in accordance with the award made by the board. The matter is before us on an appeal from the judgment of the district court.

It was in the district court, and is here, conceded that the death of Willis resulted from an accident or fortuitous event arising in the course of his employment, and the only question presented is: Did the injuries resulting in the death of Willis arise "*out of*" his employment?

We are asked to try the case anew and, disregarding the [1] findings of the board and of the trial court, to determine the question so presented, as an original proceeding, on the record made in the district court and before the board, as provided in section 22(d) of the Compensation Act (Chapter 96, Laws of 1915), which section reads as follows: "Either the board, or the appellant [applicant], or any adversary party, if there be one, may appeal to the supreme court. * * * When any such cause is so appealed it * * * shall be tried anew by said supreme court upon the record made in said district court and before said board. * * * "

It is urged that this court stands in the same position as a district court on an appeal from a justice's court and that the trial here is a trial *de novo*. But this cannot be. Section 2, Article VIII, of our Constitution, provides: "The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only. * * * " And "shall have power * * * to issue and to hear and determine * * * such * * * original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction." (Sec. 3, Article VIII.) It "shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law" (section 2, Article VIII), and shall have power to issue, hear and determine the six original writs named in section 3 of Article VIII. "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Sec. 29, Article III, Constitution of Montana.)

In *In re Weston*, 28 Mont. 207, 72 Pac. 512, this court said: " 'The source of all power vested in the supreme court is the Constitution of the state, and in it must be found the measure of jurisdiction.' * * * The power to issue, hear, and determine the six original writs enumerated above marks the limit of the original jurisdiction of this court." It will be readily seen, therefore, that the legislature was without authority to grant to this court jurisdiction to try the cause "anew" as though the matter was originally before us, and, to the extent that section 22(d) of the Compensation Act attempts to confer such jurisdiction, it is unconstitutional. In the language of the opinion in the *Weston Case*: "The full measure of the relief which may be granted is a review of the decision of the lower court and a judgment of this court affirming, modifying, or reversing the decision. Further than this we cannot go."

Section 22(b) of the Act provides that, on an appeal to the district court from the judgment of the board, "the trial of the matter shall be *de nova* [*de novo*]," but further provides that "upon such trial the court shall determine whether or not

the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case," and provides further, "The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard, on the record of the board as certified to the court by it"; and (c) "If the court shall find from such trial, as aforesaid, that the findings and conclusions of the board are not in accordance with either the facts or the law, or that they ought to be other or different than those made by the board, or that any finding and conclusion or any order, rule or requirement of the board is unreasonable, the court shall set aside such finding, conclusion, order, judgment, decree, rule, or requirement of said board, or shall modify or change the same as law and justice shall require, and the court shall also make and enter any finding, conclusion, order or judgment that shall be required, or shall be legal and proper in the premises."

As district courts are courts of original jurisdiction, it was [2] within the constitutional power of the legislature to provide that the trial in the district court shall be *de novo*, as indicated; but the power given the district court is that of review, rather than a trial anew. That this is true is emphasized by the provisions of section 20(h) that "no orders or decisions of the board shall be subject to collateral attack, and may be *reviewed or modified* only in the manner provided herein."

The district court of Silver Bow county followed the procedure outlined in the Act, and made findings "that the said Industrial Accident Board as far as it proceeded regularly, pursued its authority; that the findings of the said Industrial Accident Board ought to be sustained and that its findings are reasonable under all the circumstances of the case; that the accident to W. A. Willis, which resulted in his death, arose out of his employment for the Pilot Butte Mining Company, and therefore compensation should be awarded to the widow

of W. A. Willis, Martha Willis, as per the provisions of the Workman's Compensation Act," and rendered judgment accordingly, without making any further findings in the premises. [3] Our duty, then, is but to determine whether the evidence before the board clearly preponderates against its findings, as adopted by the court; if not, we must affirm the judgment. The rule that the supreme court will not reverse the findings of the district court, except where the evidence clearly preponderates against them, is so well settled in this jurisdiction, as to hardly require repetition.

Willis was station-tender in appellant company's mine; Brooks, the night foreman with authority over Willis. Just prior to the shooting, Brooks visited Willis on the 2,600-foot level and communicated to him an order of the day foreman that he (Willis) should remain on shift until relieved. According to Brooks, an altercation arose concerning his action in discharging one Shannon, Willis accusing him of trying to "frame up on" him as, he contended, Brooks had done on Shannon. Brooks then ordered Willis to signal for the cage to be raised to the next level that he might make an inspection there. Willis gave some signal and entered the cage with Brooks, which he had a right to do. Whether Willis gave the correct signal which was misunderstood by the engineer, or whether he gave the signal to hoist to the surface, could not be ascertained. The cage continued to the surface, and, on leaving it, the two men immediately met in personal encounter. Who was the aggressor is not entirely clear; nor is the evidence satisfactory as to the cause of the trouble. According to Brooks' version of the affray, while he gives no satisfactory explanation for the act, "Willis attempted to grab me and get my lamp, which he finally did"; that he then broke away and ran for the office. On the other hand, Willis being advised that he could not live, made the following statement: "Since I am going to die, I want you to know just what happened. We were coming up on the cage together and, as we got off the cage on the surface, Brooks hit me on the jaw with his heavy

carbide lamp. I clinched him and got the lamp, but he broke away and I after him through the side door of the boiler-room, through into the engine-room. When I reached the front door of the engine-room I could not see him, and thought to myself I'd 'bunch it' [meaning quit]. So I started for the dry, and, just as I turned off the trail to leave his lamp on the step of the office, Brooks opened the door with a gun in his hand and aimed at me. I was startled at sight of the gun, but did not think he was going to 'blast' as he held the gun on me for fully a minute before he shot me. I backed toward the dry, and he followed and shot me again and was going to shoot the third time, when I said, 'Well, I guess you 'got me,' and I fell.'" Asked the question: "'Was there any other trouble?'" Willis replied: "No trouble at all; he killed me for nothing; that's all." Two witnesses were present but saw little of the affray, and their testimony might easily corroborate the theory that either was the aggressor. After the shooting, Willis had a cut on his jaw, while Brooks had no mark on either his face or body. It is significant that, while Brooks ran to the office, Willis followed at a walk. This fact would seem to support his statement that he was but going to the dry to change his clothes; had he been intent on continuing the combat, it would seem that he would have sought to overtake Brooks on the way to the office.

The second hearing was held before the board some two years after the death of Willis and after Brooks had stood trial for the killing; while the first hearing was had before the trial and while Brooks would wish to make the circumstances as favorable to himself as possible. On this second hearing, Brooks still exhibited considerable heat on account of the fact that he was taken to the surface when he wanted to go to the next level, as shown by the following excerpt from his testimony: "Q. Do you remember when you first saw him that morning? A. On the 2,600 when I went to make my inspection. Q. And then you both came up on the cage together?" Without further question or suggestion, Brooks answered: "We both came up

on the cage together. I had an inspection to make, and he took me on over. He had no business going up above. His business was to hoist rock, and he took me on top. I did not want to go on top." It might be reasonably inferred, taking the statements of the two men together, that Brooks was angered by the action of Willis in taking him "to the top" and thus disobeying his directions, and that the blow struck with the lamp was in the nature of punishment for that act of carelessness or disobedience, and that what took place thereafter was all a part of the same transaction, and the shooting was a sequence and a part of this quarrel over the work. This was the theory of the board when it found that "the possibility of quarrels was an existing fact, as evidenced by the act of the shift boss hitting him on the head with a heavy carbide lamp, apparently because of a mistake in taking the cage to the surface when it should have stopped at the 2,400-foot level," which finding is declared by the district court to be "reasonable."

The board also found that "the conversation about Shannon would naturally be the reply to the giving of this order [to remain on shift until relieved], as there is testimony to show that the men on the shift were more or less irritated at the discharging of some of their fellow-employees, including Shannon, by Mr. Brooks. Some significance is attached to this order by the exclamation of the day foreman, Mr. Little, at the time of the shooting. He seemed to immediately conclude that his order was the cause of it. * * * There is not a particle of evidence to show that there was any personal animosity between Mr. Brooks and Mr. Willis. In fact, all the evidence shows that Mr. Willis was a peaceably inclined man. * * * The irresistible inference is that this fatal quarrel arose from the work or employment in which Willis was engaged."

The difficulty in this and kindred cases arises from the fact that we must determine a question of fact rather than a proposition of law. No clear-cut rule is, or can be, laid down; each case must be decided on its own facts and attendant circumstances and forms no precedent for future decisions. "Previ-

ous decisions are illustrations of the way in which judges look at cases, and in that sense are useful and suggestive; but I think we ought to beware of allowing tests or guides which have been suggested by the courts in one set of circumstances, or in one class of cases, to be applied to other surroundings, and thus by degrees to substitute themselves for the words of the Act itself." (Per Lord Loreburn, L. C., *Blair v. Chilton*, 8 B. W. C. C. 607, 113 L. T. Rep. (n. s.) 514, affirmed B. W. C. C. 324, 30 T. L. Rep. 623; footnote 76, p. 73, Workman's Compensation Act, a Corpus Juris Treatise.) And the same jurist, in *Kitchenham v. Steamship Johannesburg*, App. Cas. 417, 4 B. W. C. C. 311, said: "We have to decide each case on the facts. Argument by analogy is valueless. I am getting afraid to say anything more by way of judgment than that the appeal should be allowed or dismissed, because what one says in one case is used as an argument why one should decide a particular way in another case." However, certain general rules will aid in the determination of the question.

In the case of *Wiggins v. Industrial Acc. Board*, 54 Mont. 335, Ann. Cas. 1918E, 1164, L. R. A. 1918F, 932, 170 Pac. 9, this court laid down a general rule as to what accidents come within the provisions of the Act, as follows: "Without attempting to formulate a rule which will include every injury within the meaning of this phrase, it is sufficient for the purposes of this appeal to say that if, by reason of the nature of the employment itself or the particular conditions under which the employment is pursued, the workman is exposed to a hazard peculiar to the employment under the circumstances, and injury results by reason of such exposure, then it may be said fairly that the injury arises out of the employment, or, stated in different terms, the workman must have been exposed by his employment to more than the normal risk to which the people of the community generally are subject, in order that his injury can be said to arise out of his employment," "without reference to * * * fault and altogether irrespective of whether, under existing laws, actions for damages would lie." (*Lewis*

and Clark County v. Industrial Acc. Board, 52 Mont. 6, L. R. A. 1916D, 628, 155 Pac. 268.)

In the case of *State ex rel. School District v. District Court*, 140 Minn. 470, 168 N. W. 555, the supreme court of Minnesota said: "That under some circumstances an injury from an assault is one caused by accident arising out of the employment is without question; and it is as much without question that under other circumstances it is not. When the nature of the employment is such as naturally to invite assault, or when the employee is exposed to an assault by the character of his work, as when he is protecting or in charge of his employer's property, and the assault naturally results because of the employment and not because of something unconnected with it, so that it is a hazard or special risk of the work, the cases say that it arises out of the employment." (The court then summarizes the cases so holding.) "When the assault is unconnected with the employment, is personal to the assailant and the one assaulted, is not because the relation of employer and employee exists, and the employment is not the cause, though it may be the occasion, of the wrongful act, and may give a convenient opportunity for its execution, the cases say that the intentional injury does not arise out of the employment [giving illustrative cases]."

Bradbury, in his work on Workmen's Compensation (Chap. 8, Art. F, "Assaults"), digests many cases of assault, clearly demonstrating that the courts are in practical accord that (1) personal altercations in no way connected with the employee's duties do not give rise to accident arising out of the employment, but that (2) where the employee is performing work he was employed to perform, and is assaulted because of the work, or of some incident in connection with the work, or his manner of doing it, and receives an injury, it is an accident arising out of his employment.

Section 24(a) of our Compensation Act provides: "Whenever this Act or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court." And in the case of *Shea v. North-Butte Min. Co.*, 55 Mont. 522, 179

Pac. 499, it is stated that "the theory of such legislation is that loss occasioned by reason of injury to the employee shall not be borne by the employee alone—as it was under the common-law system—but directly by the industry itself and indirectly by the public, just as is the deterioration of the buildings, machinery and other appliances necessary to enable the employer to carry on the particular industry."

Among the illustrative cases cited by Bradbury, at pages 589, 590, we find the following: "A newspaper reporter was directed by his employer to get the first copy of the newspaper off the press to see if the makeup was correct. He was forcibly resisted by the pressman, the reporter repeatedly and properly attempting to do as he was instructed. When about to report the matter to his superior, the reporter was unexpectedly and without other provocation assaulted. It was held that this was an accidental injury arising out of the employment. (*Brown v. Berkeley Daily Gazette*, 2 Cal. Ind. Acc. Com. 32, [841].)

"Two workmen had an altercation in which the one who finally committed the assault was the aggressor and the employer observing it, told them they would both be discharged unless they desisted. A little later the workman who had originally been the aggressor approached from behind the other workman and struck him on the head with such force that he afterward died. It was held that the accident arose out of the employment. (*McNiel v. Mountain Ice Co.*, 38 N. J. L. 109, 11 N. C. C. A. 238.)

"A driver told a fellow-workman in a stable that he was using too much water on a horse, when the workman intentionally sprinkled some water on the driver, who was the claimant. The claimant a moment later spoke to the fellow-workman, who slapped the claimant on the shoulder, and as the claimant turned around a finger of the fellow-workman struck the claimant in the eye, causing injuries by which he lost the sight of the eye. It was held that there was sufficient evidence to sustain a finding that the injury arose out of the employment. (*Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, [L. R. A.

1917A, 344].)'' Numerous other cases are noted, but we will not cumber this opinion further by their quotation.

In its final order the board says: "It must be remembered that Mr. Brooks was night foreman, having charge of the property and employees of the Pilot Butte mine, at the time of the accident, and that he stands in the position of the employer. What he knew and did was really what the employer knew and did. In support of this view is the case of *Kinsel v. North Butte Mining Co.*, 44 Mont. 445, 120 Pac. 797. Part of the opinion in point on this question is as follows: 'The evident purpose was to show that Wells was a vice-principal. He was engaged in performing a primary absolute and unassignable duty of the master. * * * This fact in itself takes him out of the category of fellow-servants and makes him a vice-principal. * * * His negligent act was that of the master itself.' "

There seems to be some authority for an additional exception to the rule that ordinarily assault cases do not form the basis for an award when there is a difference in rank between the employee assaulted and the assaulting employee. Thus in the case of *Metropolitan Redwood Lumber Co. v. Industrial Acc. Commission Board* (Cal. App.), 182 Pac. 315, after stating the general rule, the court continues: "A second exception is also noted in the cases cited which arises * * * where the injured employee was the superior in rank to the one causing his injuries, the assault arising out of an attempted exercise of discipline on the part of the superior employee." It would seem that, if such a case constitutes an exception to the rule, the converse would also be true, and an exception would exist where, under like conditions, injury resulted to the employee sought to be disciplined.

A case similar to that just noted is *Polar Ice & Fuel Co. v. Mulray* (Ind. App.), 119 N. E. 149, where the facts were that Mulray was a bookkeeper charged with the duty of keeping a record of outgoing merchandise and the returns made by the drivers, and collecting for shortage; a driver, being angered

over an attempted collection, caused trouble in the office, when Mulray drove him off with a revolver, shooting several times over his head; the driver returned armed and killed Mulray. The court in closing its opinion said: "While it may be said that the inference that the unfortunate accident in the case was the result of a risk reasonably incident to Mulray's employment, and therefore arose out of his employment, it is not the only inference which might be drawn from the evidence, yet it is a very reasonable one, and since the industrial board has so concluded, we are required to uphold the award."

Here the inference might be drawn that the trouble between [4] Willis and Brooks arose on account of a feeling of enmity between Willis toward Brooks by reason of the discharge of Shannon, or a feeling that Brooks was attempting to seek excuse for his discharge; or it might be inferred, as it was by the board, that Brooks was the aggressor in the affray because of his anger toward Willis for carrying him to the surface when he did not want to go above the 2,400-foot level, and that what took place thereafter was all a part of the same transaction, resulting finally in the death of Willis, as a result of, and arising out of, his employment. Assuming that such were the facts, under the authorities and sound reasoning, his widow should be awarded compensation for herself and child; and the board having so found, which finding was declared by the district court, on review, to be reasonable, we are of the opinion that the judgment of the district court should be affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

CHESTER STATE BANK, RESPONDENT, v. MINNEAPOLIS
THRESHING MACHINE CO., APPELLANT.

(No. 4,125.)

(Submitted April 13, 1920. Decided May 19, 1920.)

[190 Pac. 136.]

*Claim and Delivery — Chattel Mortgages — Filing Renewals —
Change in County Boundaries—Effect on Rights of Parties.*

Chattel Mortgages—Filing—Notice to Subsequent Mortgagees.

1. Where a chattel mortgage was a valid and subsisting lien and filed in the county where the mortgagor resided, as required by the statute in force at the time, it imparted notice to a subsequent mortgagee (a bank), which acquired its right subject to the superior right of the prior mortgagee, the rights of the parties being fixed as of the date of the second mortgage, unaffected by the failure of the first mortgagee to file an extension affidavit.

Same—Valid Between Parties Until Paid.

2. A chattel mortgage is valid until the debt is paid, not only between the parties to it, but also as against others except creditors of the mortgagor and subsequent purchasers and encumbrancers in good faith.

Same—Subsequent Encumbrancer in Good Faith—Definition.

3. To constitute one a subsequent encumbrancer in good faith, he must have taken his mortgage without knowledge, actual or constructive, of the existence of a prior one.

Same—Filing—Change in Statute—Effect.

4. Where the statute in force at the time a chattel mortgage was executed required that it be filed in the county where the mortgagor resided, a subsequent change in the law requiring its filing in the county where the property was situated could not affect the validity of the mortgage.

Same—Recordation—Effect of Change in County Boundaries.

5. The validity of the recordation of an instrument affecting title to real or personal property is not affected by subsequent changes in the boundaries of the recording district, whereby the property is made to fall within a different district.

Same—Creation of New County—Renewal Filed in Old County—Effect on Rights of Mortgagee.

6. A chattel mortgage was filed by defendant in C. county, where the mortgagor resided and the property was situated, as required by section 5761, Revised Codes, before amendment, the mortgage being kept alive by renewal affidavits filed in that county. A second mortgage was taken on the same property by a bank about a year thereafter. Subsequently H. county was created, including among others, the portion of C. county, where the mortgagor resided. The bank, after the creation of the new county, filed its renewal affidavits in that county. Upon default in payment of the first mortgage, defendant bought it in on judicial sale. *Held*, under the rule above (paragraph

5), in an action in claim and delivery by the bank, that the priority of the first mortgage was not affected by the change in county boundaries by which the place of residence became part of the new county, or the failure of defendant to file its renewal affidavits in that county.

Appeal from District Court, Hill County; John W. Tattan, Judge.

ACTION by the Chester State Bank against the Great Northern Railway Company, the Minneapolis Threshing Machine Company, and others. From a judgment for plaintiff, defendant Minneapolis Threshing Machine Company, appeals. Reversed and remanded, with directions.

Messrs. H. S. Kline, C. B. Elwell and J. A. Hosp, for Appellant, submitted a brief; Mr. Elwell argued the cause orally.

The legislature could not, by its act in dividing Chouteau county and creating Hill county, affect the rights of any party which it had acquired prior to the division of the county. (See note and citations in 18 Am. & Eng. Ann. Cas. 158; 11 C. J. 529; *Parish Board of School Directors v. Edrington*, 40 La. Ann. 633, 4 South. 574; *Keys & Co. v. First Nat. Bank of Claremore*, 22 Okl. 174, 18 Ann. Cas. 152, 104 Pac. 346; *First Nat. Bank of Claremore v. Keys*, 229 U. S. 179, 57 L. Ed. 1140, 33 Sup. Ct. Rep. 642 [see, also, Rose's U. S. Notes].)

Under section 5762, Revised Codes, a junior mortgagee must take subsequent to the failure to renew in order to give him any rights as against the senior mortgagee. If he takes within the time allowed for renewal, his rights become fixed and cannot be altered by the failure to renew. As to the meaning of the words "good faith," they have been universally held to mean one taking without notice. (*Slimmer v. Meade County Bank*, 34 S. D. 147, 147 N. W. 734; *Laubenheimer v. McDermott*, 5 Mont. 512, 6 Pac. 344; *Ullman v. Duncan*, 78 Wis. 213, 9 L. R. A. 683, 47 N. W. 266; *Howard v. First National Bank of Hutchinson*, 44 Kan. 549, 10 L. R. A. 537, 24 Pac. 983; *Meech v. Patchin*, 14 N. Y. 71; *Manning v. Monaghan*, 23 N. Y.

539; *Lewis v. Palmer*, 28 N. Y. 271, 274; *Catlett v. Stokes*, 33 S. D. 278, 145 N. W. 554.)

The burden of proving that it is an encumbrancer in good faith, that is, without notice, rests upon the respondent, and that it has failed to do, and consequently its case must fail. (*Big Stone County Bank v. Crown Elevator Co.*, 111 Minn. 399, 127 N. W. 181; *Kimball v. Houston Oil Co.* (Tex. Civ.), 94 S. W. 423; *Nickerson v. Wells-Stone Mercantile Co.*, 71 Minn. 230, 73 N. W. 959, 74 N. W. 891.)

No appearance on behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In March, 1910, the Minneapolis Threshing Machine Company (hereinafter referred to as the machine company) sold to William Mitchell a steam engine and other personal property, taking from the purchaser his promissory notes, one due October 1, 1910, one October 1, 1911, and one October 1, 1912; each bearing interest at eight per cent per annum. To secure the payments of these notes, Mitchell executed to the machine company a chattel mortgage upon the property purchased. The mortgage was duly executed, and was filed in the office of the county clerk of Chouteau county, the county in which the property was situated and in which the mortgagor resided. In November of each year, 1910, 1911, 1912 and 1913, the machine company filed an affidavit renewing the chattel mortgage, and each of these affidavits was filed in the office of the county clerk of Chouteau county. In December, 1913, the mortgagor having defaulted in the payment of the indebtedness, the machine company caused the property to be sold by the sheriff as provided by law and itself became the purchaser. It took possession of the property and delivered it to the Great Northern Railway Company for shipment. Thereupon the Chester State Bank demanded possession of the property, and, upon refusal, brought this action in claim and delivery against the railway

company, the machine company, the local agent of the machine company, and the mortgagor, claiming the right to possession by virtue of two chattel mortgages executed to it by Mitchell upon this same property. The first mortgage, dated July 11, 1911, was filed in the office of the county clerk of Chouteau county and thereafter renewed by an affidavit filed in that county in January, 1912. In February, 1912, Hill county was created out of a portion of Chouteau county, which included the portion where the mortgaged property was situated and where the mortgagor resided. In August, 1912, and again in August, 1913, the bank filed its affidavit of renewal in Hill county. The bank's second mortgage was dated November 17, 1913, and was filed in the office of the county clerk of Hill county.

Upon an agreed statement embracing the foregoing facts, the case was tried by the court, as between the bank, on the one hand, and the railway company and the machine company, on the other, resulting in a judgment for the plaintiff, from which judgment the machine company prosecuted this appeal. The questions presented involve the priority of the machine company's mortgage over each of the bank's mortgages.

No contention is made that the machine company's mortgage was not secured in good faith, so that the only question presented is whether that company lost its priority by failing to file affidavits of renewal in Hill county after that county was created in February, 1912. At the time the bank's first [1] mortgage was taken, in July, 1911, the machine company's mortgage was a valid, subsisting lien upon the property in controversy on file in the county where the mortgagor resided, as required by the statute then in force. (Sec. 5761, Rev. Codes.) As such it imparted notice to the bank (*Isbell v. Slette*, 52 Mont. 156, 155 Pac. 503), which acquired its right subject to the superior right of the machine company. The rights of the parties became fixed as of the date of the bank's mortgage, and could not be affected thereafter by the failure of the machine company to file an extension affidavit, if it had

done so. (*First Nat. Bank v. Marshall*, 51 Mont. 224, 152 Pac. 36; *Slimmer v. Meade County Bank*, 34 S. D. 147, 147 N. W. 734; *Ullman v. Duncan*, 78 Wis. 213, 9 L. R. A. 683, 47 N. W. 266; Jones on Chattel Mortgages, sec. 293; 11 Corpus Juris, [2] 545; note, 47 L. R. A. (n. s.) 668.) As between the mortgagor and the machine company, the mortgage was valid until the debt secured by it was paid. (*Laubenheimer v. McDermott*, 5 Mont. 512, 6 Pac. 344.) It was equally valid during such period as against everyone except creditors of the mortgagor and subsequent purchasers and encumbrancers in good faith. (Sec. 5762, Rev. Codes; sec. 5, Chap. 86, Laws 1913.) To constitute the bank a subsequent encumbrancer in good faith, it [3] must have taken its mortgage without knowledge, actual or constructive, of the existence of the machine company's prior mortgage. (*First State Bank v. King & McCants*, 37 Okl. 744, 47 L. R. A. (n. s.) 668, 133 Pac. 30.) The machine company's mortgage, on file in the proper county and kept alive by the renewal affidavits, imparted notice to the bank (*Isbell v. Slette*, above), and therefore the bank was not a subsequent encumbrancer in good faith within the meaning of the statute now under review (*Howard v. First Nat. Bank*, 44 Kan. 549, 10 L. R. A. 537, 24 Pac. 983), and could not be heard to complain if the machine company's mortgage had never been renewed.

As observed before, when the machine company's mortgage [4] was secured, the statute required that a chattel mortgage be filed in the county where the mortgagor resided. By Chapter 86, Laws of 1913, section 5761 was repealed, and in lieu thereof was substituted a provision which required a chattel mortgage to be filed in the county where the property was situated. This statute could not affect the validity of the machine company's mortgage, but it did operate to require the bank to file its second mortgage in Hill county.

The question then arises: Did the machine company maintain [5, 6] the priority of its mortgage on file in Chouteau county upon property which came to be within Hill county, and the mortgagor of which property became a resident of Hill county,

upon the creation of that county, by filing the renewal affidavits in Chouteau county? At the time the machine company's mortgage was executed, it was filed properly in Chouteau county, and could not have been filed elsewhere. The statute then in force required, and the subsequent statute has required, that the affidavit of renewal be "filed in the office where the mortgage therein described is filed," that the clerk attach such affidavit to the mortgage, and that "the original mortgage shall then continue" in force for the period designated. (Sec. 5763, Rev. Codes; sec. 6, Chap. 86, above.) The Act under which Hill county was created (Chap. 112, Laws 1911) provided: "The board of county commissioners of any new county formed as aforesaid must provide suitable books and have transcribed from the records of the old county or counties all such parts thereof as relate to or affect property or the title thereof situate in the new county, and said records when so transcribed and certified as herein provided shall have the same force and effect as such original records." Nowhere was provision made for refileing chattel mortgages in the new county, and neither was it necessary to the validity of a chattel mortgage that it designate the particular place in a county where the mortgagor resided or where the property was situated. Manifestly, Chapter 112, above, contemplated that only such records of the old county should be transcribed as disclosed on the face of them that they affected property within the confines of the new county. Whether there ever was a transcribed copy of the machine company's mortgage filed in Hill county does not appear from this record, and in our view of the case it is altogether immaterial.

Doubtless the legislature could have required that the original mortgage be transferred from Chouteau county and refiled in Hill county, or it could have required that a certified copy be filed in Hill county, and that thereafter the renewal affidavit should be filed in the new county and attached to such copy; but it did neither of these things. It required the renewal affidavit to be filed with and attached to the original mortgage.

But further discussion of the subject is not necessary. The rule is recognized everywhere that the validity of the recordation of an instrument affecting the title to real or personal property is not affected by subsequent changes in the boundaries of the recording district, whereby the property is made to fall within a different district. (*Keys & Co. v. First Nat. Bank*, 22 Okl. 174, 104 Pac. 346, and note to same in 18 Ann. Cas. 158.)

Upon the agreed statement of facts, the mortgage of the machine company was prior and superior to each of the bank's mortgages, and by purchasing the property at the foreclosure sale under its mortgage the machine company became entitled to the possession of the property.

The judgment is reversed and the cause is remanded, with directions to enter judgment in favor of the answering defendants.

Reversed and remanded.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. WOOSTER, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,623.)

(Submitted April 30, 1920. Decided May 10, 1920.)

[190 Pac. 133.]

*Certiorari—District Judges—Disqualification for Imputed Bias
—Change of Venue—Record.*

District Judges—Disqualification for Imputed Bias—Statutes.

1. Section 6315, Revised Codes, as amended by Laws of 1909, Chapter 114, relative to the disqualification of a district judge for imputed bias, and sections 6506 and 6507, relative to change of venue after such disqualification has been effected, are companion measures and must be construed together.

Same—Change of Venue—Duty of Judge in District Having Two or More Judges.

2. *Held*, on *certiorari*, that where an affidavit of disqualification for imputed bias was filed in a district having three judges, it was the duty of the judge to call in another judge of his district to preside, and he had no power to grant a change of venue until he had done so, and the called-in judge had failed to appear and assume jurisdiction for thirty days after the motion was made.

Same—Change of Venue—Record.

3. When a judge against whom an affidavit of disqualification for imputed bias has been filed grants an order changing the venue, an order, reciting that another judge had been called in and had failed for thirty days after filing of the motion to appear and assume jurisdiction should be made and entered of record to the end that the proceedings may be subject to review.

Original writ of review by the State, on the relation of M. E. Wooster, against the District Court of the Fourth Judicial District for the County of Ravalli, and R. Lee McCulloch, a Judge thereof, to review an order changing the venue of an action by M. E. Wooster against Henry A. Jones and others. Order annulled.

Messrs. Madeen & Russell, for Relator submitted a brief; *Mr. Charles A. Russell* argued the cause orally.

Messrs. Hall & Pope, for Respondents, submitted a brief; *Mr. Walter L. Pope* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On October 8, 1919, an amended complaint was filed in cause No. 3299, then pending in the district court of Ravalli county, wherein M. E. Wooster is plaintiff and Henry A. Jones and others are defendants. Thereafter defendants, other than Jones, appeared by demurrer and motion to strike, and defendant Jones appeared by a general demurrer. On November 7 the plaintiff prepared and filed an affidavit, imputing bias and prejudice to Honorable R. Lee McCulloch, the presiding judge. On January 27, 1920, counsel for defendants, other than defendant Jones, filed their motion for a change of venue upon the ground that Judge McCulloch had been disqualified by the filing of plaintiff's affidavit. On February 19, 1920,

defendant Jones filed an amended demurrer, and four days later plaintiff filed his motion to strike the amended demurrer from the files. On April 12, 1920, the motion for change of venue was granted, and the cause ordered to Powell county for trial. Upon application to this court a writ of review was issued, and the return made by the clerk of the court discloses the foregoing facts and none other.

The statutes providing for the disqualification of a district [1] judge for imputed bias (section 6315, Rev. Codes, and Chapter 114, Laws of 1909, amendatory thereof), and for change of venue after such disqualification has been effected (sections 6506, 6507, Rev. Codes) have been considered by this court in numerous cases. Chapter 114 above worked a substantial change in the law as it existed theretofore. The provisions of that Chapter and of section 6506 above are the only ones material to this controversy. These statutes are companion measures and are to be construed together. The case of *State ex rel. Anaconda C. Min. Co. v. Clancy*, 30 Mont. 529, 77 Pac. 312, was decided long before the amendment was made to section 6315 above, and much that was said in the opinion was rendered nonauthoritative by the amendment. Since 1909 the law upon the subject before us has been reasonably plain.

In the fourth judicial district there are three judges, so that, [2] immediately upon the affidavit of disqualification being filed, it became the duty of Judge McCulloch to call in another judge of that district to preside in the action (subd. 4, sec. 1, Chap. 114 above). It was likewise the privilege of the defendants, other than defendant Jones, to move for a change of venue, but it was not within the power of the court, Judge McCulloch presiding, to grant the motion until another judge of the district had been called in and had failed for thirty days after the motion was made to appear and assume jurisdiction of the cause (sec. 6506).

District courts are courts of record, and when the statute [3] commands a disqualified judge to call in another judge, it implies clearly that an order to that effect shall be made and

entered of record to the end that the proceedings may be subject to review. So likewise, when the court, the disqualified judge presiding, grants a motion for change of venue for disqualification of the judge for imputed bias, the statute implies that an order reciting that another judge has been called in and has failed for thirty days after the motion was filed to appear and assume jurisdiction, shall be made and entered of record. It does not appear from the record before us that another judge was ever called, or, if called, that he did not respond within thirty days after the motion for a change of venue was filed, and in the absence of any record disclosing that the statute was complied with, the court, Judge McCulloch presiding, exceeded its jurisdiction in granting the motion. (Chap. 114 above.) As said by this court in *State ex rel. Sell v. District Court*, 52 Mont. 457, 158 Pac. 1018: "A change of venue is the last resort under the so-called 'Fair Trial Law.' "

The observation in *State ex rel. Interstate Lumber Co. v. District Court*, 54 Mont. 602, 172 Pac. 1030: "And since the court below had jurisdiction to entertain and determine the motion, error in its conclusion was not such an excess of jurisdiction as to render either *certiorari* or prohibition available"—was made with reference to the power of a court to change the place of trial upon the ground that the defendant resided in another county and was served with process therein, and has no application here. The authority to change the venue on account of the disqualification of the judge for imputed bias is governed by special statute applicable to that subject alone.

The order of which complaint is made is annulled, and the clerk of the district court of Powell county is directed to return the files of the clerk of the district court of Ravalli county.

Order annulled.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

WILCOX, APPELLANT, v. NEWMAN, RESPONDENT.

(No. 4,135.)

(Submitted April 14, 1920. Decided May 19, 1920.)

[190 Pac. 138.]

*Work and Labor — Contracts — Quantum Meruit—Evidence—Variance—Pleading and Practice—Reply—Nonsuit.**Work and Labor—Contracts—Quantum Meruit—Evidence—Variance.*

1. A party to an express contract may sue on *quantum meruit*, and, on showing performance, introduce the contract to prove reasonable value of the services rendered, such evidence not being objectionable on the ground of variance.

Variance—When Immaterial.

2. A variance which did not mislead defendant to his prejudice was insufficient, under section 6585, Revised Codes, to warrant the granting of a nonsuit.

Same—Duty of Party Alleging.

3. Where defendant moves for a nonsuit on the ground of variance, he must be able to prove to the satisfaction of the trial court how he was misled to his prejudice, the mere allegation that he was so misled being insufficient.

Pleading and Practice—Reply—When Unnecessary.

4. Where the averments of the answer do not amount to an admission of the allegations of the complaint, but tend to establish some circumstance or fact not inconsistent with them, deny all of such allegations and plead facts inconsistent with plaintiff's cause of action, a reply is not necessary.

Appeal from District Court, Jefferson County; W. A. Clark, Judge.

ACTION by Ruth Wilcox against L. Newman. From a judgment for defendant after nonsuit was granted and an order denying motion for new trial, plaintiff appeals. Reversed and remanded.

Messrs. Donnelly & Carleton, for Appellant, submitted a brief.

Mr. M. H. Parker and *Messrs. Freeman & Thelen*, for Respondent, submitted a brief; *Mr. James W. Freeman* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Appellant Ruth Wilcox, Roy J. Wilcox and Arthur J. Wilcox are the children of one Ida J. Wilcox. The complaint herein contains three causes of action. The first alleges that from November 26, 1911, to December 28, 1913, plaintiff, at the special instance and request of Newman, performed work and labor at his lunch counter at Clancy, Montana, which services were of the "reasonable value of \$960, being at the rate of \$40 per month"; that no part thereof has been paid, and demand for and refusal of payment. The second cause of action contains like averments, except that the services are alleged to have been performed by Roy J. Wilcox and the claim assigned to plaintiff; while the third cause of action is identical with the second, except that Arthur J. Wilcox is alleged to have performed services, during the period mentioned, of the reasonable value of \$760.

The answer, as to each of the causes of action, denies generally each of the allegations, and "alleges the fact to be" that defendant employed Ida J. Wilcox to conduct and operate the lunch counter under an agreement whereby she was to furnish and perform all labor and services necessary in connection therewith, at a wage of \$75 per month, later raised to \$90 per month, and room and board for her three children; that defendant paid the said Ida J. Wilcox the said wages as they became due during all of the said period, and furnished the room and board as agreed; that defendant had no other agreement or understanding with the said Ida J. Wilcox, or with any other person or persons, with reference to running said lunch counter; and further alleges that, during said period, each of said children was a minor.

On the trial Ida J. Wilcox, and each of the said children, testified that respondent called on them at Shelby, Montana, and employed the entire family, and, while all were present, agreed to pay each of the children \$40 per month. Each of the children, in addition to stating that such was the agreement,

testified that the sum of \$40 per month was a reasonable wage for the services performed. They attempted to explain their failure to collect their wages from month to month, by stating that they did not need the money and would as soon have it with Mr. Newman as in a bank.

The plaintiff having rested, defendant moved for a judgment [1] of nonsuit on the ground of variance, in that plaintiff sued upon an implied contract while the testimony shows that, if a contract was entered into, it was an express contract for services at \$40 per month, board and room. In urging the motion, counsel stated: "The defendant has received no intimation that there would be any other contention than the contract sued upon, which is an implied one." Thereupon the court made the following order, sustaining the motion: "There is not any question in this case that every witness has gone on the stand and has positively and absolutely sworn, as strong as they could, to an express contract, that Mr. Newman would pay them \$40 per month to go down and work for him; that is what they have sworn to on every occasion, uniformly and consistently, and the complaint alleges a *quantum meruit*, that is, the reasonable value of the services would be \$40.00 a month; there is a variance here between the pleadings, and the proof, and it is a matter that the court should take care of. The motion is sustained."

There are but two assignments of error, to-wit: That the court erred in sustaining the motion, and that it erred in overruling the motion for a new trial.

1. There can be no question but that a party with whom an express contract has been made may sue on *quantum meruit*, and thereafter, on showing a performance of the contract, introduce the express contract to prove the reasonable value of the services rendered. In the case of *Blankenship v. Decker*, 34 Mont. 292, 298, 85 Pac. 1035, 1037, this court held that "Upon a complete performance of an express contract for services at a stipulated compensation, there seems to be no sound reason why a recovery may not be had upon the *quantum*

meruit. (*Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Fells v. Vestvali*, 2 Keyes (N. Y.), 152.) In such case the effect of proof of the express contract is to make the stipulated compensation the *quantum meruit* in the case." While it is said that the statement in the *Blankenship Case* is *obiter*, the rule is again announced in the case of *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43, and in *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736, and recently in the case of *Daly v. Kelley*, 57 Mont. 306, 187 Pac. 1022, and in that of *Dalgarno v. Holloway*, 56 Mont. 561, 186 Pac. 332, where it is said: "That when a party has fully performed an express contract, he may sue upon *quantum meruit*, admits of no question in this state."

The general rule is stated in Cyc. as follows: "Where there is a special agreement and the plaintiff has performed on his part, the law raises the duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on the implied *assumpsit* or on the express agreement.

* * * The only effect in such a case of proof of an express contract fixing the price, is that the stipulated price becomes the *quantum meruit* in the case. It is not a question of variance, but only of the mode of proof of the allegations of the pleading." (9 Cyc. 685.) In the case of *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025, the rule is announced as above, but closes with the statement: "There is no reason why a recovery may not be had upon a complaint on *quantum meruit* * * * when the opposite party to the action has not been misled in his defense."

Counsel contends that, even though the general rule is as [2, 3] stated, the court was justified in sustaining the motion under the foregoing qualification to the rule. But, even though it may be said that there was a variance between the pleadings and the proof, which we will go so far as to say, our Code provides that "no variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in main-

taining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, upon such terms as may be just." (Rev. Codes, sec. 6585.) "Under such statutes, it is not enough for the party to allege merely that he has been misled, but it must be proved to the satisfaction of the court. An affidavit should ordinarily be filed showing in what respect the party has been surprised or misled." (31 Cyc. 703, 704, and cases cited.) Counsel in his motion made no suggestion that defendant was misled to his prejudice in maintaining his defense; the only variance, if any, was as to fixing the wages, rather than leaving the amount to be fixed. The defendant having denied the entire transaction, we cannot see wherein his defense could have differed had the complaint alleged an express contract as to wages in addition to the allegation of a contract of employment. The court based its order squarely on its ruling that there was a variance, without regard to the effect of the defense. The testimony, if uncontradicted, was sufficient to warrant a verdict in favor of the plaintiff, and the court erred in taking the matter from the jury.

2. Counsel for respondent insists that, even though the court [4] erred in granting the motion for judgment of nonsuit, the motion denying a new trial was proper, for the reason that new matter was set up in the answer, to which no reply was filed. The rights of the defendant by reason of the failure of plaintiff to file a replication were not raised in the court below, either by motion for judgment on the pleadings or by objection to the introduction of testimony, nor was the fact mentioned in the motion for nonsuit. The cause was tried evidently upon the theory that the issues tendered were joined by the answer. We will, however, dispose of the question of the necessity of a reply, without regard to whether the question was timely raised.

The test as to when a replication is necessary is given in the case of *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189, quoting from *Mauldin v. Ball*, 5 Mont. 96, 1 Pac. 409: " 'Whatever facts are alleged in the answer, that

might have been proved under a specific denial of the allegations of the complaint, may be considered as and are equivalent to a specific denial of such allegations, and require no replication; for such an answer forms an issue, and whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some circumstance or fact not inconsistent with all such allegations, constituting a defense or counterclaim, and which could not be proved under a specific denial, are new matter and require a replication.' The rule appears to be, then, that if the facts stated in the answer could have been proved under a denial of the allegations in the complaint, they do not constitute new matter within the meaning of the Practice Act, and the failure to reply does not amount to an admission of the truth of the matters stated as against the plaintiff."

In *Hanson Sheep Co. v. Bank*, 53 Mont. 324, 163 Pac. 1151, this court said: "Any evidence is admissible under a general denial which tends to controvert the allegations of the complaint. This includes evidence of any fact which is inconsistent with, and thus negatives, the plaintiff's cause of action."

The case of *Chealey v. Purdy*, 54 Mont. 489, 171 Pac. 926, is directly in point here, for there the court said: "The defendant, under his general denial, may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from that alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact which tends to destroy, not to avoid, the cause of action alleged."

Here the averments of the answer do not "amount to an admission of the allegations of the complaint, and tend to establish some circumstance or fact not inconsistent with such allegations," but, on the contrary, they emphatically deny all of such allegations and set up facts "inconsistent with, and thus negative, plaintiff's cause of action." Under the above rules, every fact alleged in the answer could have been proved under

either a general or specific denial of the allegations of the complaint, and no replication was therefore necessary.

The judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

NATIONAL CASH REGISTER CO., APPELLANT, v. WALL,
RESPONDENT.

(No. 4,124.)

(Submitted April 13, 1920. Decided May 19, 1920.)

[190 Pac. 135.]

Sales — Contracts — Evidence — Admissibility — Appeal and Error—Briefs—Instructions.

Contracts—Evidence—Admissibility—Varying Terms of Writing.

1. *Held*, that evidence explanatory of the circumstances leading up to the making of a written contract of sale of a cash register with reference to a "special" key attachment, as well as of the conversation had between defendant and plaintiff's agent at the time it was made, was admissible, under section 5036, Revised Codes, and not objectionable as tending to vary the writing.

Appeal and Error—Briefs.

2. Error not discussed in the brief of appellant is not entitled to review on appeal.

Contracts—Provision for Return of Article—When not Duty of Purchaser.

3. A provision in a contract for the sale of a cash register by which title was retained by the seller and which required buyer to pay expenses of transportation for repairs did not require the buyer to return the register to the seller in case it failed in the purpose for which it was sold.

Instructions—When Refusal Proper.

4. Tendered instructions inapplicable to the issues, or covered by others given, were properly refused.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

ACTION by the National Cash Register Company against F. M. Wall. Judgment for defendant, and new trial denied. Plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. C. H. Tyler and Mr. John R. Boarman, of Counsel, for Appellant.

Mr. Thomas J. Matthews, for Respondent.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was brought by appellant to recover the possession of a cash register sold to the respondent, damages for withholding its possession, and a balance alleged to be due on a promissory note given in payment therefor. The purchase, the execution of the order for its delivery, and the making of the note in payment therefor are admitted. It is affirmatively alleged that, by reason of the failure of the plaintiff to properly equip the machine with a stamping device and special keys suitable for the stamping of checks, deposit slips and other papers used by defendant in his business—as plaintiff agreed it would do—its attempted use produced such a blurring effect upon the papers upon which it was used as to make the figures difficult to distinguish; that after a fair and persistent trial, and its failure to perform the work for which it was purchased, respondent was obliged to and did discard its further use, tendered it back to the plaintiff, and refused to pay the note given as the purchase price. The defendant's affirmative defense is denied by the plaintiff. Upon the trial the jury awarded defendant a verdict in the sum of \$45.33 damages, and judgment was rendered for that amount and costs. Plaintiff has appealed from an order denying its motion for a new trial.

Many of the specifications of error charged against the trial [1] court have to do with the admission and rejection of evidence concerning the alleged defects in the machine forming the subject matter of this controversy. Appellant insists that

the contract sued on was free from ambiguity, and that the evidence interpreting the expression "denomination of keys to be special," was erroneously admitted as tending to vary, rather than to elucidate, the terms of the written instrument in question. We think counsel misconceived respondent's purpose in pressing this inquiry, as well as the theory of the court in permitting it. The only paragraph descriptive of the thing in action is as follows: "Please ship as soon as possible to your order for the undersigned at Roundup, Musselshell county, Montana, one of your 598E registers, case to be 'B' denomination of keys to be 'special.' " The word "special" as used, if it means anything, must mean "special" as distinguished from "general," "unusual" as distinguished from "usual," "extraordinary" as distinguished from "ordinary," as the words are commonly used in business transactions involving the sale and description of an article similar to the one here involved. Indeed, without a description of the stamping apparatus *abunde* the contract itself, it is difficult to conceive how a jury could understand the meaning of the word "special," unaided by an account of the circumstances and the conversation leading up to the making of the contract and the meeting of the minds of the parties upon the particulars necessary to its consummation. Clearly, an explanation of the circumstances and a repetition of the conversation between the parties at the time of the making of the contract fall within the contemplation of section 5036 of the Revised Codes. If this deduction is correct, no injury was done the plaintiff in the admission of the testimony giving the particulars attending the making of the contract. In no other way could the issues the jury were called upon to settle be made intelligible to them. This disposes of assignment of error No. 28, requesting that an instruction be given admonishing the jury to disregard all oral evidence tending to contradict, change or modify the agreement relating to the terms of the contract. The jury were properly instructed on this branch of the case, and that assignment of error must be overruled.

The refusal of the court to give plaintiff's proposed instruction [2] No. 3 was also free of error. While the refusal of the court to give it is assigned as error, counsel refrained from discussing the question in his brief. We do not, therefore, consider it incumbent upon us to discuss it. However, nowhere in the contract do we find a provision for return [3] of the register to the seller in case it failed in the purpose for which it was sold. Under its provisions title was to remain in the seller until the purchase price was fully paid, the seller agreeing "to pay transportation charges on register to and from your factory or nearest agency capable of making necessary repairs, or traveling expenses of repairman in case undersigned desires repairs made where register is located. Any repairs made without your authority to be at expense of undersigned."

The defects alleged were inherent—not due to ordinary wear and tear, and the conflict in the testimony concerning them and the representations made by the seller were matters necessary and proper for the consideration of the jury. With their determination of them under proper instructions we may not [4] interfere. The tendered instructions the court refused to give were inapplicable to the issues as finally made up, or were covered by instructions given.

We have considered all the other errors assigned and discussed in the briefs of counsel, and find none of them sufficient to overturn the verdict of the jury nor the action of the district court in entering judgment thereon and overruling plaintiff's motion for a new trial.

The order appealed from is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

WORDEN, TRUSTEE, APPELLANT, v. MORIGEAU, RESPONDENT.

(No. 4,128.)

(Submitted April 13, 1920. Decided May 19, 1920.)

[190 Pac. 122.]

Bankruptcy — Preferences — Deed—Setting Aside—Burden of Proof—Insolvency—Evidence—Insufficiency.**Bankruptcy—Preferences—Deed—Setting Aside—Burden of Proof.**

1. A trustee in bankruptcy who sought to set aside a conveyance by the bankrupt under the provisions of the Bankruptcy Act (U. S. Comp. Stat., secs. 9586-9656) has the burden of establishing by a fair preponderance of the evidence: The insolvency of the bankrupt at the time the deed was given; knowledge of insolvency by transferee sufficient to put a reasonably prudent person upon inquiry; and the existence of other creditors of the same class against whom the conveyance would operate unequally by allotting to them a lesser percentage on their debt than the defendant would receive by reason of the transfer.

Same—Insolvency—What may not Constitute.

2. Financial embarrassment does not necessarily amount to insolvency.

Same—Insolvency—Suspicious Insufficient.

3. Something more than suspicion that his grantor is insolvent is necessary to put a grantee upon inquiry at the peril of being adjudged to have received a preference.

Same—Preferences—Evidence—Insufficiency.

4. In a suit by a trustee in bankruptcy to set aside as a preference a conveyance by the bankrupt to his brother, an Indian, in consideration of a pre-existing debt, evidence *held* sufficient to sustain the *bona fides* of the transfer.

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

ACTION by H. O. Worden, trustee of Eli Morigeau, bankrupt, against Joseph Morigeau. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. William Wayne, for Appellant.

The phrase, "reasonable cause to believe," as used in this section of the Bankruptcy Act, has been construed and defined in many opinions. It covers substantially the same field as "notice." It does not mean actual knowledge, but only

such information as would put an ordinarily prudent man upon inquiry. (*Blyth & Fargo Co. v. Kastor*, 17 Wyo. 180, 97 Pac. 921; *Atherton v. Emerson*, 199 Mass. 199, 85 N. E. 530; *In re W. W. Mills Co.*, 162 Fed. 42; *In re The Leader*, 190 Fed. 624; *Tilt v. Citizens' Trust Co.*, 191 Fed. 441; *Stern v. Paper*, 183 Fed. 228; *Patterson v. Baker Grocery Co.*, 73 Or. 433, 144 Pac. 673; *Utah Assn. of Credit Men v. Boyle Furniture Co.*, 39 Utah, 518, 117 Pac. 800; *Pepperdine v. National Exchange Bank*, 88 Mo. App. 81.)

Since the amendment of 1910, the intent of the bankrupt is wholly immaterial in determining whether a transfer constitutes a voidable preference. The actual effect of the transfer is substituted for the intent of the debtor, and if the inevitable effect of enforcing the transfer will be to give the creditor grantee a greater percentage of his debt than that received by other creditors of the same class, then the transfer constitutes a voidable preference. (7 Corpus Juris, p. 154, sec. 252; *Schmidt v. Bank of Commerce*, 15 N. M. 470, 33 L. R. A. (n. s.) 558, 110 Pac. 613; *Soule v. First Nat. Bank*, 26 Idaho, 66, 140 Pac. 1098; *Patterson v. Baker Grocery Co.*, 73 Or. 433, 144 Pac. 673; *Gill v. Ely-Norris Safe Co.*, 170 Mo. App. 478, 156 S. W. 811.)

The primary purpose of the Bankruptcy Act is to "secure an equal and a speedy distribution of the property of the bankrupt among his creditors" (7 Corpus Juris, sec. 10), and it should be interpreted reasonably "with a view to effect its object and to promote justice." (7 Corpus Juris, sec. 12; *In re Blount*, 142 Fed. 263.)

Messrs. Hall & Whitlock, for Respondent.

To constitute a preference the insolvency must exist at the time of the alleged preferential transfer. To show this condition of insolvency at the time of the transfer, the schedules filed in the subsequent bankruptcy proceedings and the appraisal filed therein are not of themselves sufficient evidence. The rule is that the burden is upon the trustee to

show by a preponderance of evidence that the condition of insolvency existed at the time the transfer was made. (Collier on Bankruptcy, 11th ed., p. 869; *Tumlin v. Bryan*, 165 Fed. 166, 21 L. R. A. (n. s.) 960, 91 C. C. A. 200; *In re F. M. & S. Q. Carlile*, 199 Fed. 612; *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998.)

If the court should find that the transfer in question was a preference, then it is conceded that, in order to recover, the plaintiff must show by a preponderance of evidence that at the time of the transfer the defendant had reasonable cause to believe that the transfer would result in a preference in his favor. A mere suspicion on the part of a person in the position of this defendant as to the insolvency of his debtor, or as to the probable effect of a transfer, is not sufficient. (*Nichols v. Elken*, 225 Fed. 689, 140 C. C. A. 563; *Rosenman v. Coppard*, 228 Fed. 114, 142 C. C. A. 520; *Beall v. Bank of Bowden*, 219 Fed. 316; *Newman v. Tootle etc. Dry Goods Co.*, 174 Mo. App. 528, 160 S. W. 825.)

The question whether or not the defendant had reasonable cause to believe was one for the jury. The issue was submitted to the jury and it found in favor of the defendant, and this finding should not now be disturbed. (See *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190, 25 Sup. Ct. Rep. 33 [see, also, Rose's U. S. Notes]; *Coleman v. Decatur Egg Case Co.*, 186 Fed. 136, 108 C. C. A. 248; *Marshall v. Nevins*, 242 Fed. 476, 155 C. C. A. 252; *Kentucky Bank & Trust Co. v. Pritchett*, 44 Okl. 87, 143 Pac. 338; 7 C. J. 274.)

MR. JUSTICE COOPER delivered the opinion of the court.

This action was instituted in the court below by appellant, as trustee in bankruptcy of Eli Morigeau, who received patent for his Indian allotment embracing the west half of the northwest quarter, and the southeast quarter of the northwest quarter of section 25, township 17 north, range 21 west of the Montana meridian, situated in Sanders county, on August 26, 1912. By deed dated December 16, 1913, recorded on the

thirty-first day of that month, the consideration being a pre-existing indebtedness amounting to the sum of \$12,000, Eli conveyed the land so patented to his brother Joseph Morigeau. On February 13 following, Eli Morigeau filed his petition to be declared a bankrupt; the approved claims against his estate amounting to the sum of \$8,833.85, \$2,944.76 of which originated after the date of the issuance of patent. As will be observed, the conveyance was made within four months prior to the filing of the petition in bankruptcy. The district court, aided by the finding of a jury declaring that the defendant, Joseph Morigeau, did not have "reasonable cause to believe that the enforcement of said transfer would effect a preference in his favor," found for the defendant, entered judgment in his favor validating the transfer, and denied plaintiff's motion for a new trial. From the judgment and order so made, this appeal is prosecuted.

It is appellant's contention that the agreed statement of facts admits all of the elements of a voidable transfer, save two, to-wit: The insolvency of the bankrupt at the time of the transfer, and that the grantee had "reasonable cause to believe that the enforcement of such * * * transfer would effect a preference." The frailty of appellant's contention lies in the failure of the evidence to show that Joseph Morigeau knew his brother Eli was insolvent at the time of the transfer; knew that he was then indebted to other persons than himself, or, if he owed debts other than those due defendant, that he did not have sufficient other property to satisfy all his creditors. These facts the trustee is bound to establish by a fair preponderance of the evidence before a transfer of this character can be avoided. This is the spirit of the Bankruptcy Act (U. S. Comp. Stats., secs. 9585, 9656).

"By the statute's very words," says the supreme court of the United States in *Pyle v. Texas Transport & Terminal Co.*, 238 U. S. 90, 59 L. Ed. 1215, 35 Sup. Ct. Rep. 667 [see, also, Rose's U. S. Notes], "in order to set aside such a transfer and recover the property it must appear that 'the person receiving'

it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference.' Whether such 'reasonable cause to believe' existed is a question of fact and the burden of proof is upon the trustee." (*Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *Cader v. Arts*, 213 U. S. 233, 16 Ann. Cas. 1008, 53 L. Ed. 772, 29 Sup. Ct. Rep. 436 [see, also, Rose's U. S. Notes]; *Wright v. Sampter* (D. C.), 152 Fed. 196; *Calhoun County Bank v. Cain*, 152 Fed. 983, 82 C. C. A. 114; 2 Remington on Bankruptcy, sec. 1404; *Marshall v. Nevins*, 242 Fed. 476, 155 C. C. A. 252.)

This court, in the recent case of *De Forrest v. Crane & Ordway Co.*, 55 Mont. 494, 179 Pac. 292, had occasion to consider a question similar to the one under discussion, and in its disposition made use of this language: "Though a transfer is made which amounts to a preference, yet it is not unlawful within the meaning of section 60b [of the Bankruptcy Act (32 U. S. Stats. at Large, 799)], unless the creditor receiving it had reasonable cause to believe that the debtor intended thereby to give him a preference; that is, to pay him a larger percentage of his claim than others would receive. As pointed out by the court in *Pirie v. Chicago Title & Trust Co.*, *supra* [182 U. S. 438, 45 L. Ed. 1171, 21 Sup. Ct. Rep. 906 [see, also, Rose's U. S. Notes], if reasonable cause for this belief does not exist, the preference cannot be recovered from the creditor by the trustee."

The plaintiff in this case could not hope to prevail until he [1] had established by a fair preponderance of the evidence these conditions: The insolvency of the bankrupt at the time the deed was given; knowledge of insolvency on the part of the transferee sufficient to put a reasonably prudent man upon inquiry; and the existence of other creditors of the same class against whom the conveyance would operate unequally by allotting to them a lesser percentage on their debt than the defendant would receive by reason of the security given. In *Grant v.*

Nat. Bank, supra, this language is used by Mr. Justice Bradley: "It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt." The test [2, 3] of the sufficiency of the evidence does not rest upon the assertions by either party of his intent or belief, but on inferences which may fairly arise from the facts in evidence. (*Hamilton Nat. Bank v. Balcomb*, 177 Fed. 155, 100 C. C. A. 575.) Financial embarrassment does not necessarily amount to insolvency. (*In re Bratlett* (D. C.), 172 Fed. 679.) Something more than suspicion is necessary to put a reasonably prudent man upon inquiry. (*Brookheim v. Greenbaum* (D. C.), 225 Fed. 638.) In the latter case the court made use of these very pertinent remarks: "It does not seem to me that, in case of a man who concededly did business in such an unbusiness-like way as this bankrupt, shortness of cash and absence of free capital, continuing for so long a period of time without any insolvency, ought to be enough to put on inquiry all those who dealt with him. It must be remembered that something more than suspicion is necessary. (*Stucky v. Masonic Savings Bank*, 108 U. S. 74, 27 L. Ed. 640, 2 Sup. Ct. Rep. 219; *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971 [see, also, *Rose's U. S. Notes*]; *Sharpe v. Allender*, 170 Fed. 589, 96 C. C. A. 104 (C. C. A. 3d Cir.); *J. W. Butler Paper Co. v. Goembel*, 143 Fed. 295, 74 C. C. A. 433 (C. C. A. 6th Cir.); *Re Goodhile* (D. C.), 130 Fed. 471.) These cases all decide that it is not enough that the bankrupt is in temporary straits and the debt overdue."

The law recognizes in every person the right of absolute dominion over his property; and he may dispose of it at will, so long as he is able to meet his obligations as they fall due. But when he reaches a state of financial disability equivalent to what the bankruptcy law terms insolvency, he is precluded from making a transfer of his property, or a payment to a creditor that will give to one creditor an advantage not af-

forded to all of the same class. Unless, therefore, the evidence establishes that the transfer in question was taken by Joseph Morigeau under circumstances not justified by the law as above stated, the judgment of the district court was right and must be affirmed. In dealing with these considerations it must be remembered that the bankrupt and the defendant lived a distance of more than twenty-five miles apart; that they seldom met; that they were both Indians and wards of the federal government, and—as the testimony implies—Eli had no more capacity for keeping track of his accounts than could be expected of the average Indian of his class; so that it is hardly to be expected that he could or did impart to his brother a knowledge of his affairs sufficient to create in his mind the degree of apprehension the law demands. These conclusions are fairly deducible.

The evidence relied upon by appellant to upset the findings [4] and judgment of the jury and the court is marshaled in his brief as follows: "From 1910 to December, 1913, he [defendant] had been letting the bankrupt have money until the bankrupt's indebtedness had grown to the large sum of approximately \$12,000. During these years he had been sued at law on notes which he had signed with or for the bankrupt. On the occasion of the bringing of this action, Mr. Violette, the plaintiff's attorney, went to the home of the defendant and the two rode together from Plains to Missoula, Mont., on January 24, 1912, and Mr. Violette testified, 'He told me on that trip to Missoula—we sat together all the way down—of Eli's financial troubles and gave me a history of these troubles.' We were coming down on the train to settle the suit that was brought with one of the defendants; that was the reason he was coming in to see if he could settle, and on the train he discussed Eli's financial troubles and his financial condition with me. We talked about it most all the way. He told me then that likely he would have to pay this, *that Eli was broke, that he could not pay his debts, that he owed other people*, that was the substance of what he said. The sheriff, who served the papers in the suit

referred to, came back from the defendant's home to Plains with the defendant, and during this trip the defendant told the sheriff 'that it was not his own personal debt but that it was Eli, that he went on a note with him at the Western Montana National Bank, and he said he would go in with me and try and settle it up in some way; he said Eli seemed to be in quite a little difficulty financially.' * * * The defendant told the witness that Eli owed him other money and that Eli 'was kind of hard up and owed quite a little.' Also, 'He mentioned owing other people and something to the effect that Eli was in bad shape financially.' "

The defendant himself testified that "In 1912 he went to the bankrupt and told him that if he kept on loaning him money he would be broke. Q. And Mr. Morigeau, what made you say that to Eli? A. Well, sir, my money was going, and I could not see a prospect on his side where it was going. He was a brother of mine, and I said a whole lot, and I thought that would let him see a little where I got off at." Again the witness was asked and testified as follows: "Q. Well, what did you think, Mr. Morigeau, about the idea of his getting so heavily in debt to you, up to \$12,000? A. Well, sir, after I was in so much I thought I might as well stay with it and go broke; it is hard to refuse." And again: "Q. Now, Mr. Morigeau, when you decided you would take this property from Eli in payment of everything he owed you, how much did you think the property worth? A. I thought I was getting thirty cents on a dollar and I might as well take that as nothing. Q. Might as well take that as nothing? A. Yes, and I don't believe it is worth any more to-day."

His further testimony was that, when he took the deed, he knew of no other debts for which Eli was liable; that he supposed at the time that no other claims than his own existed against him; that he did not ask Eli about his financial affairs, and no information came to him regarding them from Eli or from any other source. The testimony of Mr. Violette and the sheriff, Mr. Moser, referred to occurrences of two years prior

to the giving of the transfer by Eli, and in the very nature of things could shed but little light on the financial condition of the bankrupt at the time of the giving of the transfer to the defendant. It is not disclosed by the record that Joseph believed that the money advanced by him to Eli was not applied to the discharge of other indebtedness owing by him; nor that the taking of the transfer would give him an advantage over other creditors of Eli of the same class. On these and other questions the jury reached a conclusion which the trial court approved. On the whole, we are convinced that the evidence sufficiently preponderates in favor of the *bona fides* of the transfer to fully justify the verdict and to sustain the judgment appealed from.

The judgment and the order denying a new trial are affirmed.
Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

STATE EX REL. HARNDEN, RESPONDENT, v. CRAWFORD,
SHERIFF, APPELLANT.

(No. 4,142.)

(Submitted April 15, 1920. Decided May 24, 1920.)

[189 Pac. 1119.]

Husband and Wife—Divorce—Mortgages—Foreclosure—Right of Divorced Wife to Redeem.

1. *Held*, that a divorced woman has no right to redeem lands which belonged to her former husband and which were sold under mortgage foreclosure, though at the time the mortgage was executed she was the wife of the mortgagor, joined in its execution as well as that of the note secured by it, and was a party defendant in the foreclosure suit.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

PROCEEDING by the State, on relation of Emery D. Harnden, for writ of *mandamus* against Merritt Flanagan, as Sheriff of Chouteau County. From a judgment issuing a peremptory writ defendant appeals. Affirmed.

Mr. A. G. Waite and *Mr. W. S. Towner*, for Appellant, submitted a brief; *Mr. Waite* argued the cause orally.

Section 6839, Revised Codes, prescribes the steps necessary to be taken by a redemptioner. Judgment debtors and their successors in interest do not come within the class termed "redemptioners," and therefore are not required to follow the demands of section 6841 in making redemption. (*Yoakum v. Bower*, 51 Cal. 539; *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843; *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653.) A tender to the sheriff of the amount necessary for redemption is the only act required by the statute in order that the judgment debtor may redeem. (*Hershey v. Dennis*, 53 Cal. 77; 2 Freeman on Executions, sec. 271a.) A judgment debtor is not a "redemptioner" as defined in subdivision 2 of section 6837. (*Calkins v. Steinbach*, 66 Cal. 117, 4 Pac. 1103.)

The right of redemption is guaranteed to a judgment debtor by the provisions of section 6837, and such redemption by him may take place, though no certificate of redemption be issued by the sheriff. (*Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843; *Leet v. Armbruster*, *supra*.) A tender by the judgment debtor of the amount necessary to redeem "is a redemption," though the tender may have been refused. (Cases above cited.) No present interest in the property sold by the sheriff need be shown in the judgment debtor to entitle him to redeem. (*Lorenzana v. Camarillo*, 45 Cal. 125; *Yoakum v. Bower*, *supra*.) The right to redeem springs from the fact of having executed the notes and mortgage; and it is no concern to the mortgagee whether or not the mortgagor in point

of fact has a valid title to the mortgaged premises or any part thereof. (*Lorenzana v. Camarillo*, and *Yoakum v. Bower*, *supra*.) It is the contention of the relator that the redemption or attempted redemption on the part of Ora Lester was ineffectual, for the reason that her rights in the lands of her former husband had been cut off by divorce proceedings. Ora Lester is not seeking to redeem as the wife or former wife of Harry Schaeffer; she is not seeking redemption to protect an inchoate right of dower,—she seeks to redeem as a judgment debtor. And we submit that such right is given her by the provisions of section 6837, Revised Codes.

The tender by the judgment debtor of the amount necessary to redeem is a redemption though the tender may have been refused. The trial court held that Ora Lester had not complied with the statutory provisions entitling her to redeem because she had not filed the certificates, *etc.*, required of a “redemptioner.” We submit that the statute makes two classes of persons who may relieve property from a sheriff’s sale, *viz.*: A judgment debtor and a redemptioner. We do not claim to be a redemptioner as that term is used in the statute, and hence are not required to comply with the provisions of section 6841. (*Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.)

Messrs. Stranahan & Stranahan and *Mr. C. W. Wiley*, for Respondent, submitted a brief; *Mr. F. E. Stranahan* argued the cause orally.

A “judgment debtor” necessarily means a judgment debtor who has an interest in the whole or any part of the property. Now, if the divorced wife, Ora Lester, is such a judgment debtor, or is entitled to redeem under section 6837, Revised Codes, then, if she be allowed to redeem as contended for by the appellant, she would be “restored to her estate.” In other words, as the divorced wife of Harry Schaeffer, in whose name the land stands, she has absolutely no interest in the land, and should she be allowed to redeem as the appellant contends, she

would be allowed "to be restored to her estate" when she has no estate to be restored to, an absurdity that needs but to be stated to carry with it its own refutation. (*Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714, 715.) In that case the court, speaking of a wife who had joined in a mortgage on her husband's land, declared that she was not a judgment debtor as that term is defined in the statutes. The court further declares as follows: "As wife of the mortgagor plaintiff did not redeem and could not." The court further declares that the term "judgment debtor," as used in section 6837, Revised Codes, "refers exclusively to the debtor whose land was subject to forced sale." This decision is fortified by an abundance of decisions from other courts of last resort.

A divorced wife has no interest in the realty of her husband. (*Billan v. Hercklebrath*, 23 Ind. 71.) A bill to redeem cannot be maintained by a person not having any title to the mortgaged premises. (*Purvis v. Brown*, 39 N. C. 413.) The complainant should show that she has an interest in the equity of redemption, and the character and duration of the interest. (17 Ency. Pl. & Pr. 968 (3).) A prerequisite to the right of a person to maintain a suit to redeem is that he have a definite interest in the premises which are to form the subject of redemption even though his interest attach to a portion only, and though he is merely subrogated to the rights of the owner. (17 Ency. Pl. & Pr. 949 Ill. (1); *Maynard v. Hill*, 125 U. S. 190, 31 L. Ed. 654, 8 Sup. Ct. Rep. 723 [see, also, Rose's U. S. Notes].) A person who has lost, forfeited or repudiated his title to mortgaged premises, or his lien thereon, can no longer assert a right to redeem from the mortgage or sale. (27 Cyc. 813; *Smith v. Austin*, 11 Mich. 34; *Connecticut Mutual Life Ins. Co. v. King*, 72 Minn. 287, 75 N. W. 376; *Shields v. Russell*, 142 N. Y. 290, 36 N. E. 1061.) One who has no interest in the premises, but is only a volunteer, cannot maintain a suit for redemption. (17 Ency. Pl. & Pr. 955 (2); *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 245, note.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This proceeding in *mandamus* was instituted by Emery D. Harnden to compel the sheriff of Chouteau county to issue to him a deed for certain real property sold under a decree of foreclosure and purchased by Harnden. It is alleged in the [1] application that, after the expiration of one year from the date of sale, relator made demand upon the sheriff for a deed, but the demand was refused; that the property had not been redeemed; and that relator is the owner and holder of the certificate of sale. The sheriff attempted to defend upon the ground that one Ora Lester, the former wife of the mortgagor of the premises, had within the year after sale tendered the amount necessary to effect a redemption; that, at the time the mortgage was executed, Ora Lester was the wife of the mortgagor and joined with him in executing the notes, the payment of which was secured by the mortgage. The trial court sustained a demurrer to this answer and rendered judgment that the peremptory writ issue. From that judgment this appeal is prosecuted.

There is presented for determination the question: Has a divorced woman such an interest as entitles her to redeem lands which belonged to her former husband and which were sold under mortgage foreclosure, by virtue of the fact that she was the mortgagor's wife at the time the mortgage was executed and joined him in executing it and the note secured by it, and was a party defendant in the foreclosure suit? The inquiry is answered in the negative by the decision of this court in *Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714, and upon the authority of that case the judgment herein is affirmed.

Affirmed.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

SMITH, EXECUTRIX, RESPONDENT, v. SULLIVAN, APPELLANT.

(No. 4,132.)

(Submitted April 14, 1920. Decided May 24, 1920.)

[190 Pac. 288.]

Work and Labor — Pleading — Complaint — Anticipating Defense—Refusal to Strike—Harmless Error—Admissions—Evidence—Loose-leaf Ledger—Admissibility—Rules of Evidence—Construction.

Pleading — Complaint — Anticipating Defense—Admissions—Refusal to Strike—Harmless Error.

1. If error was committed in refusing to strike a paragraph from plaintiff's complaint in an action for work and labor performed and goods furnished, which anticipated defendant's defense by alleging that the latter had an offset or counterclaim in a stated amount, it was rendered harmless by permission to defendant to plead a counterclaim for the same amount for which he received credit, plaintiff's allegation amounting to no more than an admission that the amount stated was due defendant.

Evidence—Loose-leaf Ledger—Admissibility.

2. *Held*, that pages of a loose-leaf ledger containing plaintiff's account for work done and supplies furnished, the items having been immediately transferred to the ledger from time-cards filled out by the mechanics doing the work and using the supplies, were properly admitted in evidence though the mechanics themselves were not called to testify and their absence was not explained, the book-keeper, however, stating that the ledger was honestly and correctly kept in the regular course of business.

Rules of Evidence—Construction.

3. Rules of evidence are not intended to be ironclad, but must be so construed that they will adapt themselves to the varying situations which changing conditions in the business world render imperative.

[As to admissibility of duplicate sales slip or sheet from loose-leaf ledger as book of account, see note in *Ann. Cas.* 1914D, 489.]

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Letitia M. Smith, executrix, substituted for M. G. Smith, deceased, against Michael Sullivan, doing business as the Sullivan Electric Company. From a judgment for plain-

The question of admissibility of "ledger" in evidence is discussed in a note in 52 L. R. A. 581.

tiff and an order denying a new trial, defendant appeals. Affirmed.

Mr. J. E. Healy, for Appellant, submitted a brief, and argued the cause orally.

The open and patent error in admitting the slips in evidence ought to require no argument, in the light of the decisions of this court. (*Meredith v. Roman*, 49 Mont. 204, 141 Pac. 643, and cases there cited.) The record herein is silent as to any reason why the original slips made by the men who it is claimed did the work were not produced in the trial of this case; it is equally silent on the reason why the men themselves were not called, or their absence in some way accounted for. See the very pertinent remarks of Judge Lumpkin of Georgia in the case of *Creamer v. Shannon*, 17 Ga. 65, 63 Am. Dec. 226, and quoted in Gillette on Indirect and Collateral Evidence at section 184. We invite the court's attention to the full discussion of Mr. Gillette in section 173 *et seq.* of the above work, and to the annotations in Smith's Leading Cases to the case of *Price v. Earl of Torrington*.

Nor is the excuse sufficient that this case falls within the rule given in our Code in sections 7941 and 7951, Revised Codes. The chapter in which the sections quoted are found are evidently taken from California, and we find no decision of that state which departs from the rule of property there set forth and declared. As we have pointed out the usual course of business was not followed herein. Besides the same person did not make the original entry and the alleged copy. There was no evidence of infallibility in any of the persons named or in the plaintiff himself. The California courts and our own court show no disposition to depart from the time-honored rule established in *Meredith v. Roman* and in the cases cited in the note to section 1947 of the California Code of Civil Procedure, Kerr's Cyclopedic Edition. On the contrary, the case herein illustrates the positive unjust consequences which flow from departing from the established

pathway. A copy made by the same person at or near the time of the transaction may be just as good as the original and may be an original under the statute. But to extend the rule beyond that is to turn a judicial proceeding into a farce.

Messrs. John E. Corette and Carl J. Christian, for Respondent, submitted a brief; *Mr. Christian* argued the cause orally.

Even in the absence of a statute such as section 7951, Revised Codes, it is uniformly held by the courts that entries made into books of account, of goods sold or labor or work done, from sales slips, charge slips, slates, etc., if made at or near the time of the original charge or entry, are admissible in evidence as original entries. In such cases the first entry or charge is regarded as preparatory or preliminary to the final record in the regular book of account or ledger. The regular book of account is regarded as the first and original entry, and, as such, competent proof of the charges therein set forth. (*Landis v. Turner*, 14 Cal. 573; *Wisconsin Steel Co. v. Maryland Steel Co.*, 203 Fed. 403, 121 C. C. A. 507; *Place v. Baugher*, 159 Ind. 232, 64 N. E. 852; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *American Locomotive Co. v. Hamblen*, 217 Mass. 513, 105 N. E. 371; *Ingraham v. Bockius*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730; *McGoldrick v. Trophagen*, 88 N. Y. 334, 335; *Faxon v. Hollis*, 13 Mass. 427; *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87; *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521.)

In the following cases, upon statutes practically identical with section 7951, books such as the trial court here admitted in evidence were held to be properly admissible to prove the item set forth in same, and that there need be no further proof of the correctness of the items than the production of the book and the testimony of the bookkeeper as to its correctness, and that the items were by the bookkeeper correctly transcribed from the original slips. (*Weinberg v. Garren* (Tex. Civ.), 155 S. W. 1013; *Navarre v. Honea*, 41 Okl. 480, 139 Pac. 310.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The plaintiff in his complaint alleges that between November 23, 1915, and August 15, 1916, he performed certain work and labor upon automobiles owned by the defendant, and furnished repair parts and pieces for such cars, and sold and delivered to defendant oil, gasoline and other materials; that the work was done and the goods were furnished at the special instance and request of defendant, and were of the reasonable value of \$556.17, no part of which has been paid except the sum of \$52.90. The complaint then contains the following paragraph: "But the defendant has a legal offset or counterclaim for goods, wares and merchandise and labor sold and delivered and performed by the defendant for the plaintiff between the 11th day of September, 1915, and the 14th day of April, 1916, of the reasonable value of, \$202.11, and there is now due, owing, and unpaid from the defendant to the plaintiff the sum of \$301.16." The prayer is for the balance, \$301.16.

The defendant appeared and moved to strike from the complaint the paragraph above; and, the motion being denied, he answered, admitting that he had employed plaintiff to perform certain work and furnish certain repairs for the automobiles, but under a special contract that the cost should not exceed \$90. The other allegations of the complaint are denied, and defendant then pleaded as a counterclaim the same account mentioned in the paragraph above. There was issue joined by reply, and the trial thereafter resulted in a verdict for plaintiff, according to the prayer of the complaint. In passing upon a motion for new trial, the court required plaintiff to remit \$25 of the amount of the verdict, and, this having been done, judgment was entered, the motion denied, and defendant appealed.

1. Error is predicated upon the ruling of the trial court, [1] refusing to strike from the complaint the paragraph quoted above. It is true that the draftsman violated the rules of good pleading in attempting to anticipate the defendant's

defense, but the allegation amounted to nothing more than an admission on plaintiff's part that he owed defendant \$202.11, and if he had merely admitted the same while a witness on the stand, or by failing to deny the allegations of defendant's counterclaim, the position of the parties would not have been altered. Defendant was permitted to plead the same account as a counterclaim, and received credit for it. It is therefore impossible for us to perceive in what manner defendant could have been prejudiced by the court's ruling. The maxim, "Error appearing, prejudice will be presumed," ceased to be of force or effect in this state many years ago. It is now the rule that this "court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

2. Plaintiff kept a garage in Butte, and was engaged in the business of repairing automobiles, and selling oil, gasoline and other supplies. He worked as a laborer himself, and employed [2] three or four other mechanics. Repair parts were supplied to the mechanics by plaintiff or his bookkeeper. Every mechanic was furnished a time-card, and it was his duty and practice to enter in writing on this card, as he proceeded with his work, the amount of time devoted to each separate job and the materials used by him thereon. Every day these time-cards were turned in to the bookkeeper, who immediately transferred the items to a loose-leaf ledger, distributing to each job each workman's time upon that job and the materials used by him, with the price of the same. Apparently the time was kept in dollars and cents, based upon the prevailing wage scale. The time-cards and loose-leaf ledger constituted the only books of account employed in plaintiff's business. The evidence discloses that this method of procedure had been employed with respect to defendant's cars. The leaves of the ledger containing defendant's account disclose that three or four of the mechanics, other than plaintiff, had

worked upon defendant's cars from time to time. These other mechanics were not called to testify; neither was their absence explained. Plaintiff and the bookkeeper were the only witnesses in plaintiff's behalf.

In so far as indicated by the time-cards kept by himself, plaintiff testified that the work was done and materials were supplied and actually used on defendant's cars, and that the several amounts charged therefor were reasonable. He also testified that he maintained careful supervision of the other mechanics; had observed them at work and using materials upon defendant's cars, and positively identified some of the items; that he knew in a general way that their time-cards actually spoke the truth, but upon cross-examination admitted that he was frequently out of the garage, and could not know definitely that the accounts on the time-cards of the other mechanics were absolutely correct. The bookkeeper testified that the materials charged upon the time-cards of the other mechanics were actually delivered to the mechanics for use upon defendant's cars; that she had observed these mechanics at work upon defendant's cars, and had seen some of the parts placed in the cars, and could identify some of the items, but she was not able to say that all the time and materials indicated upon those time-cards had actually been employed upon defendant's cars.

The items of time and materials thus definitely identified constituted only a portion of the whole. To supplement this evidence and make out the case against defendant for the entire amount of the bill, plaintiff introduced in evidence, over objection, the loose leaves from the ledger which contained defendant's account, and the ruling of the court admitting this evidence is assigned as error. Our Code (section 7862) provides: "A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible." This statute is but declaratory of the common-

law rule in force generally, long before the Code was adopted. [3] The rules of evidence were never intended to be iron-clad. The law is progressive. It is not intended that a new rule shall be adopted to meet the exigencies of every new case, but the general rules are to be so construed that they will adapt themselves to the varying situations which the lapse of time and changing conditions in the business and commercial world render imperative. The purpose of the rule above is to elicit facts; to obtain the best evidence consistent with the circumstances of the case, or, in other words, to require that degree of proof, which produces conviction in an unprejudiced mind.

It is insisted by appellant, in effect, that it required the composite testimony of the several mechanics and the book-keeper to render the books of account admissible, and, in the absence of the mechanics, the books contained an element of hearsay which rendered them inadmissible. To the general rule that a witness must speak from personal knowledge, a number of exceptions have been recognized by the courts generally, and this is particularly true with respect to the character of evidence now under consideration. If the mechanics were dead or out of the jurisdiction of the court at the time of the trial, the authorities generally would admit the books if they were kept in the usual course of business and the entries were transferred to them within a reasonable time after they were made, and this upon the ground of the impossibility of obtaining the confirmatory testimony. Other authorities have expanded the exception somewhat, and grounded the admissibility of the books upon the unavailability of the confirming witnesses, without reference to the cause of the unavailability. Wigmore on Evidence, section 1530, after considering the exceptions noted, as where the entrant or transactor is dead or both of them are dead, treats of the subject now under review as follows:

“One more consideration remains to be noted. The supposition in the above cases was that B. or S. or both were dead.

But suppose, instead, that S., the salesman, teamster, or the like, is otherwise unavailable; is the result to be any different? It need not be. In the language of Chief Justice Shaw, already quoted (*ante*, par. 1521): 'The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial.' Now the ordinary conditions of mercantile and industrial life in some offices do in fact constantly present just such a case of practical impossibility. Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employees have in many cases changed, and the former ones cannot be found; in the next place, it cannot always be ascertained accurately which employee was concerned in each one of the transactions represented by the hundreds of entries; in the third place, even if they could be ascertained, the production of the scores of employees to attend court and identify in tedious succession the detailed items of transactions would interrupt and derange the work of the establishment, and the evidence would be obtained at a cost practically prohibitory; and finally, the memory of such persons, when summoned, would usually afford little real aid. If unavailability or impossibility is the general principle that controls (*ante*, par. 1521), is not this a real case of unavailability? Having regard to the facts of mercantile and industrial life, it cannot be doubted that it is. In such a case, it should be sufficient if the books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in that establishment, and the production on the stand of a regiment of bookkeepers, salesmen, shipping clerks, teamsters, foremen or other subordinate employees, should be dispensed with. No doubt much should be left to the discretion of the trial court; production may be required for cross-examination, where the nature of the controversy seems to require it. But the important thing is to realize that upon principle there is no objection to regarding this situation as rendering in a given

case the production of all the persons practically as impossible as in the case of death.

“The conclusion is, then, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so. Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the courtroom. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, courts must here cease to be pedantic and endeavor to be practical.”

If only the death of the mechanics or their absence from the jurisdiction of the court would excuse their being called as witnesses, then it might occur that, although within this state, they would be at such distance from the place of trial that their mileage and *per diem* as witnesses would amount to

more than the total of the items of the account which they would be called upon to identify. It cannot be possible that the law contemplates that a clerk who has sold fifty cents worth of ribbon must be called as a witness, at an expense of at least three dollars—the *per diem* of a witness for one day—to identify the sale slip, before the account-books containing the item can be admitted in evidence to prove that the ribbon was sold. Furthermore, some of the transactions recorded upon the time-cards of these absent mechanics occurred a year and a half prior to the trial, and it is inconceivable that, if called, they could have remembered the facts recorded. At best, they could probably have done nothing more than identify the entries upon the cards as in their handwriting, and generally testified that they kept accurate accounts. There are numerous reported cases which hold that the books are admissible under the exception as amplified by Wigmore above, without calling the clerks who made the entries upon the sale slips or time-cards, and without explaining their absence, and the reasoning of these courts appeals to us. Among the leading cases of this class are *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171, 2 Ann. Cas. 841, 76 Pac. 905; *L. & N. R. Co. v. Daniel*, 122 Ky. 256, 3 L. R. A. (n. s.) 1190, 91 S. W. 691; *Firemen's Ins. Co. v. Seaboard A. L. Co.*, 138 N. C. 42, 107 Am. St. Rep. 517, 50 S. E. 452.

In *Meredith v. Roman*, 49 Mont. 204, 141 Pac. 643, the account-books were excluded, but the facts were that the book-keeper was not called, his absence not accounted for, and the books were not identified: The court said: "There was in fact no preliminary evidence tending to show that the books had been kept in the usual course of business, that the entries had been made contemporaneously with the transactions out of which the charges grew, or that they had been honestly and correctly kept. The defendant Bennett, in connection with whose testimony they were offered, testified in substance that he knew nothing of them, except that they had been delivered to him by Bradley after the work had been completed. This

preliminary evidence was necessary to render the books admissible.”

Our conclusion is that the record contains sufficient evidence of the trustworthiness of the time-cards to admit the ledger which, under the provisions of section 7951, Revised Codes, was the book of original entries. It was within the sound discretion of the trial court to require the mechanics to be called, or not, and in the absence of any showing of abuse of discretion the ruling admitting the book was not erroneous. The bookkeeper identified the ledger as the book kept by the plaintiff in the regular course of business, testified that the entries upon the time-cards were transferred to the ledger contemporaneously with the transactions; that the items were transferred accurately, and the book fairly, honestly and correctly kept.

The judgment and order denying a new trial are affirmed.

Affirmed.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

WIPF, RESPONDENT, v. KELLEHER ET AL., APPELLANTS.

(No. 4,140.)

(Submitted April 15, 1920. Decided May 24, 1920.)

[190 Pac. 294.]

Trial—Pleading and Practice—Counterclaim—Variance—Failure to Amend—Nonsuit—Affirmance.

1. Where defendant failed to ask permission to amend his counterclaim though his attention had been called to a variance between his allegations, both by objection to the introduction of testimony in support of it and plaintiff's motion for nonsuit because of the variance, the order of the court granting the motion will not be disturbed on appeal.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by Joseph A. Wipf against James Kelleher and Leon A. Kelleher, copartners doing business under the firm name and style of James Kelleher & Son. From a judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Affirmed.

Mr. E. K. Cheadle and *Mr. A. D. Strouf*, for Appellants, submitted a brief; *Mr. Cheadle* argued the cause orally.

Messrs. Belden & De Kalb, for Respondent, submitted a brief; *Mr. O. W. Belden* argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

This is an action brought to recover upon a promissory note executed and delivered by the appellants to the respondent. For answer, the appellants admit the execution of the note, and by way of counterclaim allege that on the twenty-second day of May, 1915, respondent and appellants entered into a written contract, by which the respondent agreed to purchase an Avery separator from the appellants; that the said note should be applied in payment of freight upon, and the purchase price of, the said separator, and that whatever balance of the purchase price should remain due upon the said separator after the application of the whole of the sum represented by said note should be paid in cash by the respondent to the appellants; that the appellants furnished the separator according to the terms of the contract, but that the respondent refused, and still refuses, to accept the same, to appellants' damage in the sum of \$285, which said sum it is alleged was the amount which the appellants would have realized upon the said separator under the terms of said contract as their commission for selling the same. It is further alleged that before the commencement of the action the appellants tendered to the

respondent the amount due upon said note, less the said sum of \$285. There was reply.

Upon the trial, at the conclusion of the testimony, on motion [1] of the respondent, the court granted a nonsuit as to the counterclaim because of variance between the pleadings and the proof, and instructed the jury to return a verdict in favor of the respondent for the full amount sued for in the complaint. Judgment was then entered in favor of the plaintiff. From that judgment and from an order denying a motion for a new trial, this appeal is taken.

It appears from the testimony that the defendants purchased the machine outright from the manufacturer, agreeing to sell the same to the plaintiff, and that what they denominated as commissions is probably the difference between the cost price thereof with freight added and the sum which they had agreed to charge the plaintiff as the purchase price of the machine, and that their cause of action or counterclaim, if any, was because of the plaintiff's refusal to comply with the terms of the contract in refusing to accept the machine, and not for alleged commissions.

The question is whether the testimony offered by appellants constituted a counterclaim, as alleged in the answer. The Revised Codes provide:

Section 6059: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:

"1. If the property has been resold, pursuant to section 5803, the excess, if any, of the amount due from the buyer under the contract, over the net proceeds of the resale; or,

"2. If the property has not been resold in the manner prescribed by section 5803, the excess, if any, of the amount due from the buyer under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it."

Objection was made to all testimony offered by appellants touching the alleged counterclaim, and in addition the motion for a nonsuit pointed out specifically that the allegations of the counterclaim were at variance with the testimony. No request was made for permission to amend.

With the record in this condition we do not feel that the trial court should be put in error for holding that there was a variance, it appearing that the defendants did not, either by their pleading or proof, bring themselves within the rule of the statute, though had they done so the evidence at hand would have entitled them to go to the jury.

The judgment and order appealed from are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent during consultation of the court, took no part in the decision.

STATE EX REL. EXAMINING AND TRIAL BOARD ET AL.,
RELATORS, v. JACKSON, DISTRICT JUDGE, RESPONDENT.

(No. 4,624.)

(Submitted April 30, 1920. Decided May 24, 1920.)

[190 Pac. 295.]

*Prohibition—Metropolitan Police Law—Dismissal of Officer—
Certiorari—Examining and Trial Board—Record.*

Prohibition—Person "Beneficially Interested"—Conclusions.

1. Unless facts are shown by relator in his affidavit on application for writ of prohibition that he is beneficially interested, his bare assertion that he is so interested is a legal conclusion and insufficient.

Same—City Officers—Persons "Beneficially Interested."

2. *Held*, that the mayor of a city and the members of the examining and trial board of its police department as such were "beneficially interested," within the meaning of section 7228, Revised Codes,

in their application for writ of prohibition to stay *certiorari* proceedings instituted by a discharged police officer to review the board's action, which latter writ commanded relators, among other things, to return to the district court a transcript of the testimony introduced before them, which they claimed to be unable to do.

[As to when prohibition will lie against council or executive officer of municipal corporation, see note in 20 Ann. Cas. 962.]

Metropolitan Police Law—Examining and Trial Board—Removal of Officer—*Certiorari*.

3. *Certiorari* lies to review the action of the examining and trial board of the police department of a city in discharging an officer under the provisions of the Metropolitan Police Law, if the complaint on which he was tried did not state facts sufficient to constitute the offense with which he was charged, or, the complaint being sufficient, if there was no substantial evidence tending to prove the charges.

Same—*Certiorari*—Insufficiency of Petition—Conclusions.

4. Where the application of a discharged police officer for writ of *certiorari* running to the examining and trial board contained neither a copy of the complaint in support of his assertion that it was insufficient nor a *résumé* of the testimony to show failure of proof, and his affidavit stated only legal conclusions, the court was without jurisdiction to issue the writ.

***Certiorari*—Insufficiency of Affidavit—Motion to Quash Proper.**

5. Though the Codes make no provision for a motion to quash a writ of *certiorari* for insufficiency of the affidavit filed in support of the application, the motion is a proper method for testing the sufficiency of the pleading.

Prohibition—Writ Lies, When.

6. Under the rule that prohibition lies not only to prevent what remains to be done, but to undo what has been done, the writ will run to stay proceedings under *certiorari* improperly issued on an affidavit lacking the essentials to give the district court jurisdiction.

Same—Lies When Remedy by Appeal Insufficient.

7. Relief by writ of prohibition is proper where, though an appeal lies, the district court cannot, for lack of jurisdiction, render a valid judgment under any conceivable circumstances.

Metropolitan Police Law—Trial of Officer—Record of Testimony—*Certiorari*.

8. Since the examining and trial board of the police department of a city is not, under the Metropolitan Police Law, required to make or keep a record of the testimony produced before it on the trial of an officer charged with misconduct, the district court was without authority to command it, on *certiorari*, to return *inter alia* a transcript thereof to aid in determining whether the evidence was sufficient to warrant an order of removal.

***Certiorari*—Scope of Writ.**

9. *Certiorari* lies only to determine whether a tribunal exercising judicial functions has exceeded its jurisdiction or authority.

Metropolitan Police Law—Removal of Officer—Insufficiency of Evidence—*Certiorari*.

10. *Certiorari* held ineffectual for the purpose of determining whether an examining and trial board of a city police department exceeded its jurisdiction in that it removed an officer on insufficient evidence, since the board is not required to make or keep a record

of the testimony produced before it and therefore cannot be compelled, under the writ, to make return thereof.

Same—Remedy of Officer Dismissed by Examining and Trial Board.

11. *Semble*: It would seem that the remedy available to a police officer dismissed from the force by the examining and trial board of the department, after trial, on alleged insufficient evidence, is an independent suit in equity to set aside its order on the ground that its findings on which the order was based was not supported by the proof.

Original application by the State of Montana, on the relation of the Mayor and the Examining and Trial Board of the Police Department of the City of Butte, for a writ of prohibition directed to the District Court of the Second Judicial District for the County of Silver Bow. Motion to quash alternative writ overruled, and peremptory writ granted.

Mr. R. L. Clinton and *Mr. C. F. Juttner*, for Relators, submitted a brief; *Mr. Clinton* argued the cause orally.

Mr. Ed. Fitzpatrick and *Messrs. Canning & Geagan*, for Respondent, submitted a brief; *Mr. Fitzpatrick* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Prohibition to stay the action of respondents on writ of *certiorari* issued against relators at the instance of one James Burns, discharged police officer of Butte.

The affidavit of relators recites that proceedings were commenced against Burns, charging acts constituting conduct unbecoming a police officer, notice given and hearing had as required by law, findings of the board sustaining the charges, and dismissal by the mayor. Thereupon Burns applied to the respondent court for a writ of *certiorari*, which was issued commanding relators to certify and return to said court a full transcript of the record of the hearing, including all exhibits and all testimony offered on the hearing. Relators appeared and moved to quash the writ for insufficiency of the affidavit, lack of jurisdiction in the court, and that the court had

exceeded its authority in ordering a tribunal not a court of record to return a transcript of the testimony taken. The motion was denied. Respondents move to quash the alternative writ of prohibition on the grounds:

(1) That it does not appear from the affidavit upon which the writ was issued that relators are entitled to any relief by writ of prohibition or at all.

(2) That the facts set forth in said affidavit and application are not sufficient to authorize the issuance of the writ.

1. It is contended that there is no allegation or statement in the affidavit that relators are the persons beneficially interested, nor does it appear therefrom that they are so interested, nor that the same was made on behalf of the city of Butte.

Section 7228 of the Revised Codes provides that the [1] writ may be issued "upon affidavit on the application of the person beneficially interested." A statement in the affidavit that relators are persons beneficially interested would be but a legal conclusion, and, if made, would not be sufficient, in the absence of a statement of facts showing the correctness of the conclusion. (*State v. Ellis*, 47 La. Ann. 1602, 18 South. 636.) The affidavit and application must show facts from which the court can determine the questions involved. (*Dakan v. Santa Cruz Superior Court*, 2 Cal. App. 52, 82 Pac. 1129; *In re Francis*, 7 Idaho, 98, 60 Pac. 561; *Clifford v. Parker*, 13 Wash. 518, 42 Pac. 717.) In determining whether the relators are entitled to the writ, the court will look to the allegations of fact rather than for the recital of conclusions on the subject.

While the application here is made only by the mayor and [2] the examining and trial board of the police department of the city, it must be remembered that they are officers sworn to protect the interests of the city, and are the respondents in the very proceeding which they are seeking to have stayed, and it cannot be said that they are not parties in substance, or that they will not derive benefit from the issuance of the writ; on the contrary, it would seem that relators are vitally

interested, as officials of the city, in determining whether they shall be compelled to reinstate an officer to thereafter work with and under them, after they have, in their official capacity, determined that he is unfit for the position.

In the case of *State v. Superior Court*, 4 Wash. 30, 29 Pac. 764, the supreme court of Washington held that a county attorney, whose duty it was to protect the treasury of the county, was entitled to apply for the writ to prevent illegal disbursements, stating: "We think it would be a strained construction of the proprieties to hold that the officer whose duty it is made by statute to represent the state and county * * * should not upon his own oath state the facts which constitute the basis of this proceeding. * * * Prohibition is said to be the converse of *mandamus*, but the same degree of strictness as to parties is not maintained." (Citing *High on Extraordinary Remedies*, 764, 779.)

This case, in our judgment, presents an entirely different question from that decided in *State ex rel. Hackshaw v. District Court*, 48 Mont. 481, 138 Pac. 1100, where it was held that the board of county commissioners were not beneficially interested in the subject matter of an appeal from their order granting a saloon license. There the question was as to a private right or privilege, while here the best interest of the city, which relators are sworn to uphold, is involved. Further, the relators are directly affected by the order of the court compelling them to make return of a transcript, which they allege they cannot do, and which would, if effective, require them to thereafter employ a stenographer and make a transcript of the testimony in all proceedings before the board.

2. The affidavit recites the official status of relators; the filing of charges against Burns, notice to him of the time and place of hearing, his plea to the complaint and the hearing, findings and order of discharge of the officer. It sets out the complaint in full. It then recites the application of Burns for the writ of *certiorari*, setting out his affidavit in full; the writ issued out of the district court, their motion to quash the

same, and the order overruling the motion. It then recites the fact that said board is not a court of record, and never had in its possession or under its control any transcript of the testimony, that relators have no plain, speedy and adequate remedy at law, and that the trial court is proceeding and will proceed without jurisdiction. While these latter statements are in the nature of conclusions, relators have set out, in their affidavit, all of the facts from which the conclusions may be drawn, and, if, as alleged, the respondent court was without jurisdiction to issue the writ complained of, in the first instance, and it further appears that the relators have no plain, adequate and speedy remedy in the ordinary course of law—which questions will be considered later—the relators were entitled to the alternative writ, and the motion to quash should be overruled.

In addition to the motion, respondents filed their answer to the allegations of the application, which joins issue on the questions of law involved, and we will now consider such questions as are properly presented.

3. The relators' first contention is that the petition filed in [3, 4] the court below, and on which the writ of *certiorari* was issued, shows on its face that the board had jurisdiction of the party, and regularly pursued each and every statutory step required under the Metropolitan Police Law in order to invest it with jurisdiction. A careful examination of the affidavit of Burns, a copy of which is attached to the application here, discloses such to be the fact; but if, as is contended on behalf of Burns, the complaint on which he was tried before the board did not state facts sufficient to constitute the offense with which he was charged, or if, as alleged, there was no substantial evidence offered tending to prove the charges, even though the charges filed were sufficient, the writ issued by respondent court would lie, and relators here would not be entitled to the relief sought in this court. However, the application contained neither a copy of the complaint nor a *résumé* of the testimony, and the district court was in no position to

pass upon the sufficiency of the complaint or the substantiality of the evidence.

4. The second ground urged is that affiant's showing was not sufficient to entitle him to the writ of *certiorari*; that his affidavit contained no facts, "but only a mass of legal conclusions." The affidavit gives no intimation as to what were the charges preferred in the complaint against him, nor does it set out facts to support the conclusions that "the complaint does not state facts sufficient to constitute the charge"; that "no substantial evidence whatever was introduced or produced," or that "the said board and mayor failed to comply with or see that all the essential requirements of law in said proceeding had been fully complied with," but required the court to accept the bald conclusions quoted in order to determine the question of its jurisdiction to issue the writ. Respondents now contend that, whether such determination was correct or not, the action of the district court is conclusive, as "the only purpose of the writ is to move the reviewing court to act. When the writ issues the affidavit becomes *functus officio*. (*State ex rel. First Trust & Sav. Bank v. District Court*, 50 Mont. 259, 146 Pac. 539.) But counsel mistakes the purport and application of the language quoted; it was used by the court in connection with the declaration that the affidavit "is not a pleading, and its averments cannot be traversed by any other pleading." Its averments are taken as true, and cannot be denied; but the court does not intimate that the sufficiency of those averments cannot be questioned, either on appeal or in appropriate proceeding for that purpose; the court in fact stated: "The writ of review is issued upon a proper affidavit by a party beneficially interested. (Sec. 7204, Rev. Codes.)" If the affidavit is lacking in the essentials, it is as though no affidavit was filed.

Respondents, however, contend that the question cannot be [5] raised, as our statute makes no provision for a demurrer or motion to quash. They, therefore, contend that the only

course open, on the issuance of the writ, is to make the return commanded, and cite in support of their contention the case of *Garrison v. Malheur County Court*, 54 Or. 269, 101 Pac. 900, decided under a similar statute. There, it is true, we find the statement: "The statute makes no provision for demurrer or motion to quash. When the writ issues, the inferior court has no alternative but to send up its return, and the hearing is then had upon the inspection of the writ and the return, and no demurrer or motion is necessary." But that portion of the opinion immediately preceding the quotation explains the language used, as follows: "Counsel for appellant ingeniously argues that respondents, having made a full return to the writ in the court below, without interposing any motion to quash or any demurrer on account of defects of parties, are precluded from raising that question, and will be held to have waived it." Even though it be conceded that the case cited sustains the contention of respondents, the supreme court of Oregon has, in the later case of *Drummond v. Miami Lumber Co.*, 56 Or. 575, 109 Pac. 753, followed the general rule on the subject. The court there declares: "As authoritatively settled in this state, it is essential to the availability of a proceeding by writ of review that the petition state facts sufficient to authorize the issuance of the writ, the inadequacy of which statement is fatal to the proceeding. This makes it necessary, in the case before us, to examine only the petition presented by the record, the competency of which is assailed by *proper motion*." (Italics ours.)

The rule is thus stated in 11 Corpus Juris: "The application must also set out with reasonable certainty, but not necessarily such certainty as rebuts every conclusion to the contrary, facts, and not merely conclusions of law, showing illegal action below and consequent injury, so that the court may see, assuming the petition to be true, that there is error." (Page 149.) "Defects in the writ should be taken advantage of by motion or by application to supersede, before filing the return."

(Page 170.) "Insufficiency of the petition for the writ in that its allegations do not show that the petitioner is entitled to the writ, is ground for quashing the writ"—citing numerous cases.

In *Drummond v. Miami Lumber Co.*, *supra*, the applicant set up certain facts contained in his complaint in a justice's court, and that a trial was had, and then alleged that: "After hearing the evidence introduced by the respective parties, the said court found the allegations of plaintiff's complaint were true, * * * but wrongfully and unlawfully dismissed plaintiff's complaint and wrongfully and unlawfully rendered judgment against plaintiff." The court said: "Neither the answer * * * nor the averments therein appear in the petition. So far, therefore, as is disclosed by the petition the defendant may have pleaded and established some adequate defense to the action, and that this was done may be inferred from the holding of the court to the effect that there was no cause for instituting the action. If, however, the answer was insufficient for that purpose, or if anything occurred at the trial disclosing irregularities prejudicial to the substantial rights of plaintiff, on account of which it may appear that the judgment was 'wrongfully and unlawfully entered,' it was incumbent upon plaintiff to so state in the petition. * * * We can determine the truth of these assertions only by the facts from which these conclusions are deduced. * * * In other words, as used in the petition, the averments are statements of conclusions only."

In the case before us, as in the *Drummond Case*, the averments in the petition, or affidavit, are statements of conclusions only, and, in the absence of allegations of fact from which the conclusions may be drawn, it may be inferred from the findings of the board that the complaint was sufficient and the evidence substantial and convincing. The petition was wholly insufficient, and the lower court was therefore without jurisdiction to issue the writ.

5. It is contended that, the court having acted in the issuance of the writ, prohibition will not lie to require the

undoing of that which has been done; but the rule is that: "Where anything remains to be done by the court, prohibition will give complete relief, not only by preventing what remains to be done, but by undoing what has been done." (32 Cyc. 630, and cases cited in note 6.) Relators exhausted their remedy in the court below by presenting the question on their motion to quash, thus giving that court an opportunity to correct its error in the issuance of the writ, and are properly before this court for relief.

6. Respondents contend that the writ of prohibition does not [7] lie because of the fact that relators have a remedy by appeal from any judgment finally rendered, citing *State ex rel. Browne v. Booher*, 43 Mont. 569, 118 Pac. 271. This question is, however, disposed of by the decision in the case of *State ex rel. Lane v. District Court*, 51 Mont. 503, 508, L. R. A. 1916E, 1079, 154 Pac. 200, 202, as follows: "It is urged that the remedy by appeal from an adverse final judgment is available to the relator, and that the writ of prohibition should be denied for that reason. While our Code provides that the existence of a remedy by appeal will defeat the right to relief by *certiorari* (Rev. Codes, sec. 7203), the like provision is not found in the section applicable to the writ of prohibition. Unless the remedy by appeal, or by other proceeding, is plain, speedy, and adequate, relief by prohibition may be granted in a proper case. (Rev. Codes, sec. 7228.) The existence of a remedy by appeal does not necessarily defeat the right to relief by prohibition. (*State ex rel. Marshall v. District Court*, 50 Mont. 289, Ann. Cas. 1917C, 164, 146 Pac. 743.) An application of this character is addressed to the sound discretion of this court (*State ex rel. Mackel v. District Court*, 44 Mont. 178, 119 Pac. 476); and whenever it is made to appear, as in this instance, that under no conceivable circumstances can the district court render a valid judgment because of a lack of jurisdiction, the discretion should be exercised in favor of issuing the writ, to the end that litigants

may be saved the needless trouble and expense of prosecuting their litigation to a fruitless judgment."

The district court and the litigants should know at once that the court is without jurisdiction to proceed in the matter before it, to the end that, if the discharged officer is entitled to reinstatement, proper proceedings to that end may be instituted without the unnecessary delay attendant upon final determination of a proceeding which can determine no issue.

7. Is *certiorari* the proper proceeding? Under sections 6238 [8] and 6249, Revised Codes, the court of impeachment, the supreme court and the district courts of the state, and only those courts, are courts of record. In no other tribunal exercising judicial functions can the magistrate, person or board officiating be compelled, in the absence of a special statutory requirement, to make or keep a record of the testimony. There is no such provision in our Metropolitan Police Law (sec. 3308, Rev. Codes), and if, on such a hearing, a stenographer is employed and does take the testimony, such employment is without warrant of law, and the record of the testimony is unofficial, and could be used thereafter only by mutual agreement or stipulation, as was done in the case of *State ex rel. Griffiths v. Butte*, 57 Mont. 368, 188 Pac. 367. The court here was without authority to command the board to return the transcript, if one was made, and it does not appear from the application for the writ of *certiorari* that the board had or could obtain such a transcript.

The writ of *certiorari* can only require a return of "a transcript of the record of the proceedings" (sec. 7206), which would properly include only the complaint filed, the notice given, with all minute entries made concerning the same and concerning the motion and plea of the defendant, the setting of the matter for hearing, the formal entries of the hearing, the findings of the board, and the final order disposing of the matter and removing the officer. Our statute provides that, on such a hearing: "The decision of the board shall be final and conclusive, and shall not be subject to review by any

court, on question of fact. The district court of the proper county shall have jurisdiction, however, in a suit brought by the officer or member, to determine whether the essential requirements of law have been complied with in the matter of his trial." (Sec. 3308, Rev. Codes.)

In the case of *Weston v. Charleston*, 2 Pet. 464, 7 L. Ed. 481, quoted in *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449 [see, also, Rose's U. S. Notes], Chief Justice Marshall said: "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy • • • which the law affords him." The term, as used in our statute, would, therefore, include the proceedings instituted in the lower court. However, the writ can only be employed to determine whether a tribunal exercising judicial functions has exceeded its jurisdiction or authority. (*State ex rel. Allen v. Napton*, 24 Mont. 450, 62 Pac. 686; *State ex rel. King v. District Court*, 24 Mont. 494, 62 Pac. 820; *State ex rel. B. & M. etc. Min. Co. v. District Court*, 22 Mont. 241, 56 Pac. 281; *State ex rel. Harris v. District Court*, 27 Mont. 280, 70 Pac. 981.)

As the record in the instant case would contain no transcript of the evidence, it would seem that the writ would be ineffectual, since the only ground on which excess of jurisdiction could be urged is that the evidence was insufficient to warrant the findings of the board. And it would seem, therefore, that the manner in which the question could be reached would be by an independent suit in equity to set aside the judgment or order on the ground of the insufficiency of the evidence to warrant the findings on which such judgment or order is based, in which suit, the facts being properly pleaded, evidence could be introduced to establish what testimony was given before the board.

The motion to quash the alternative writ will be overruled, and the peremptory writ, as prayed for, will issue, staying

further action of respondents, and directing the dismissal of the proceedings.

Writ granted.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER, concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

CHURCH, RESPONDENT, v. ZYWERT, APPELLANT.

(No. 4,141.)

(Submitted April 14, 1920. Decided May 24, 1920.)

[190 Pac. 291.]

*Sales—Breach of Contract—Measure of Damages—Evidence—
Defect of Parties—Waiver.*

Sales—Breach of Contract—Measure of Damages.

1. Where, in an action for the breach of a contract of sale of cattle, the proof sufficiently showed the market price nearest the place of delivery in Montana to enable the jury to arrive at the measure of damages established by section 6081, Revised Codes, admission in evidence of the price actually received for them at Omaha, Nebraska, did not constitute reversible error.

Defect of Parties—Objection—How Taken—Waiver.

2. Under Revised Codes, section 6534, if a defect of parties appears on the face of the complaint, it must be taken advantage of by demurrer, which, under section 6535, must point out specifically the defect relied on; where it does not so appear, objection may be taken by answer (section 6538); if not so taken, the defect is deemed waived in either case.

Same—Waiver.

3. *Held*, under the above rules (par. 2), that defendant, who at the time he filed his answer was cognizant of facts constituting an alleged partnership between plaintiff and another in the transaction at issue, failed to raise the question of defect of parties by his pleading, waived the objection.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

ACTION by A. J. Church against J. Zywert. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. H. C. Crippen, for Appellant.

The market value at Billings, Montana, the place of delivery of the cattle was not made the basis of the verdict in this case. It is clearly apparent from the verdict, which was for the exact amount asked for as damages in the complaint, that the jury based its verdict upon the market at Omaha, Nebraska, where they were sold.

"The general rule is that the measure of damages, when the buyer repudiates the contract and refuses to receive and accept the goods, is the difference between the contract price and the market value of the goods at the time and place of delivery." (35 Cyc. 592.) "The market value means the usual and ordinary selling price of the goods at the place of delivery, but if there is no market at the place of delivery, the market value at the nearest point where there is a market may be taken." (*Id.*; 2 Encyclopedia of Evidence, 593, 594; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.) Before the market price of the cattle in controversy could be shown, at Omaha or at any other place, it would first have to be shown that there was no market for the same at Billings, and this was not done.

The real party in interest did not bring the action and there is a fatal variance between the pleading and the proof as to parties. The defendant maintains that he did not know Church individually in any dealings with regard to the cattle in question; that he supposed Church and Runkle were partners; that they represented themselves to him as partners, and that they were known generally as partners in the cattle business, and especially in connection with the bunch of cattle in question. The testimony of plaintiff himself, that in this deal

he and Runkle were to share equally in the profits or losses, shows conclusively that a partnership did exist between Church and Runkle. See the following cases: *Bowman & Cockrel v. Ed. Blanton & Co.*, 141 Ky. 407, 132 S. W. 1041; *Bank of Overton v. Thompson*, 118 Fed. 798, 56 C. C. A. 554; *Dawson v. Blitch*, 11 Ga. App. 840, 76 S. E. 596; *Steckman v. Galt State Bank*, 126 Mo. App. 664, 105 S. W. 674; *McNealy v. Bartlett*, 123 Mo. App. 58, 99 S. W. 767; see, also, 30 Cyc. 379, and cases there cited.

If there was a partnership existing between Runkle and Church in regard to these cattle, then Mr. Runkle was a necessary party plaintiff in the action, and the proof of a contract between the defendant and Church and Runkle would not substantiate the allegations of the complaint in this action, which sets up a contract between the defendant and Church individually. (*Bumpus v. Turgeon*, 98 Me. 550, 57 Atl. 883; *De Wit v. Lander*, 72 Wis. 120, 39 N. W. 349; *Kalamazoo Trust Co. v. Merrill*, 159 Mich. 649, 124 N. W. 597; *Leola Lbr. Co. v. Bozarth*, 91 Ark. 10, 120 S. W. 152; 30 Cyc. 561.)

If the court should hold that the evidence in the case was insufficient as a matter of law to prove that a partnership did exist, certainly there was sufficient evidence of the matter to go to the jury, and if the jury should find under the instructions of the court that there was a partnership, then the defendant was entitled to a verdict in his behalf. (*Moning Dry Goods Co. v. Wiseman*, 60 Okl. 94, 159 Pac. 259; *Hoteling v. McCarty*, 46 Okl. 541, 149 Pac. 142; *Seabury & Johnson v. Bolles*, 51 N. J. L. 103, 11 L. R. A. 136, 16 Atl. 54; *Wagoner v. First Nat. Bank*, 43 Neb. 84, 61 N. W. 112; *First Nat. Bank v. Freeman*, 47 Mich. 408, 11 N. W. 219; *Manegold v. Grange*, 70 Wis. 575, 36 N. W. 263.)

If there was a partnership, then there was a fatal variance between the pleading in the complaint and the proof submitted in support thereof, and defendant was entitled to a verdict. The defendant, therefore, contends that the court

erred in refusing to submit the question of partnership to the jury.

Mr. C. R. Ingle, for Respondent.

The court properly instructed the jury that the measure of damages was the difference in the market value of the cattle, at Billings, and the contract price, as provided in section 6081, Revised Codes. The fact that the jury found only \$1,350 damages is due to the fact the court instructed them that this amount was the limit of their finding under the complaint while the proof actually showed a greater amount, based on the measure of damages.

Defendant, by assignment of error, No. 4, attempts to raise his main contention, that is, that there is a defect or misjoinder of parties plaintiff. The objection not appearing upon the face of the complaint could only be taken by answer. (Sec. 6534, Rev. Codes.) An examination of the answer will disclose that no such affirmative defense is alleged and that the answer is nothing more than a general denial of the allegations of the complaint. Therefore defendant has waived the question. (Sec. 6539, Rev. Codes; *Parchen v. Peck*, 2 Mont. 567; *Conklin v. Fox*, 3 Mont. 208, 211; *Knatz v. Wise*, 16 Mont. 555, 41 Pac. 710; *Logan v. Billings & Nor. R. Co.*, 40 Mont. 467, 107 Pac. 415.) A partnership did not exist between plaintiff and Runkle. (See *Flathead County State Bank v. Ingham*, 51 Mont. 438, 153 Pac. 1005; *Beasley v. Berry*, 33 Mont. 477, 482, 84 Pac. 791.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The complaint herein alleges that plaintiff sold to defendant, at an agreed price per pound, approximately 100 head of cattle, to be delivered in lots during the months of August and September, 1916; that the first delivery was made August 1, received and paid for by defendant, but that thereafter, by reason of a decline in the market, he refused to receive and

pay for the remainder of the cattle, although plaintiff was at all times ready, willing and able to make the deliveries, and that by reason of the breach of the contract plaintiff was forced to sell at a loss, on the Billings market, of \$1,350.75.

In his brief, counsel for defendant states: "The theory of the defendant, as shown by his answer, was that whatever dealings he had with regard to the purchase of the cattle was had by him with the plaintiff and one Runkle, as partners. This theory is borne out by the evidence of the plaintiff." The answer, however, merely denies specifically each of the allegations of the complaint, and goes no further. It contains no averment suggesting that defendant had any dealings with either Church or Church and Runkle; nor does it contain any intimation that plaintiff, in his individual capacity, was not the proper party plaintiff.

On the trial defendant was permitted, without objection, to show that while Church purchased the cattle and was sole owner of them, he had an agreement with Runkle that the latter was to assist in disposing of them, and was to receive one-half of the profit, if any, and to share any loss sustained. Both parties having rested, defendant moved for a directed verdict on the ground of nonjoinder of parties, insufficiency of the evidence as to the market value at Billings, and that the complaint did not state a cause of action, which latter objection also referred to suit by Church in his individual capacity. The motion was overruled, and the court refused all offered instructions based on the assumption that a partnership existed. The jury returned a verdict for the amount sued for. Defendant moved for a new trial, which motion was denied. The appeal is from the judgment and from the order denying his motion for a new trial.

1. The first assignment of error is predicated on the court's [1] action in overruling defendant's objection to the question, "What did you receive for the cattle at Omaha?" While it is true that the measure of damages is deemed to be the difference between the contract price and the price which

the seller could have obtained in the market nearest the place of delivery under the contract (sec. 6081, Rev. Codes; *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339), and therefore the admission of proof of the price received in a different market, alone, for the purpose of fixing the damages, would constitute error, the plaintiff only incidentally proved the actual amount received for the cattle and thereafter introduced evidence of the market value of the cattle in the proper market. There is no error assigned on the insufficiency of this evidence; and the court properly instructed the jury as to the measure of damages under the statute. If, therefore, the ruling of the court was erroneous, it could not have affected the substantial rights of the parties, and must be disregarded. (Sec. 9415, Rev. Codes; *State ex rel. Nipp v. District Court*, 46 Mont. 425, Ann. Cas. 1916B, 256, 128 Pac. 590.)

2. The remaining assignments are directed to the action of the court in its refusal to direct a verdict, refusal to give certain offered instructions, and in overruling the motion for a new trial, and are all based on the contention that the evidence disclosed a partnership. They will therefore be considered together.

The facts on which defendant relies were known to him at [2, 3] the time he drew and filed his answer. They do not appear on the face of the complaint. Under our Code, if a defect in parties appears on the face of the complaint, it must be taken advantage of by demurrer (Rev. Codes, sec. 6534), and the demurrer must point out specifically the defect relied upon (section 6535). (*Poe v. Sheridan County*, 52 Mont. 279, 157 Pac. 185.) When not so appearing, the objection may be taken by answer. (Section 6538.) "If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same." (Section 6539.) These provisions have been in effect since territorial days, the only change being that in the last provision quoted the word "must" has been substituted for that of "shall," and were construed in the case of *Parchen v. Peck*, 2 Mont. 567, where the court

said: "The evidence shows that the Northwest Transportation Company was a firm * * * composed of the appellant, Durfee and Coulson. Durfee has since died. It is claimed that the court erred in proceeding against Peck, and that Coulson should have been joined with him. * * * The appellant did not set forth in his answer that Coulson was a member of the firm, or that there was a nonjoinder of parties. Can judgment be entered against Peck under the issues?" The court then quotes the provisions of the Civil Practice Act referred to, and continues: "These sections have been interpreted in the following cases: *Fosgate v. Herkimer M. Co.*, 12 N. Y. 584; *Zabriskie v. Smith*, 13 N. Y. 336; Voorhies' Code, sec. 148. According to these authorities, we hold that the appellant waived any objection that Coulson was not a party by his omission to point out the same."

The provisions of our Codes and the above decision are in accord with the general rules on the subject, noted in Cyc. as follows: "A defense that the plaintiff is not the real party in interest and hence has no right to sue must be specially pleaded in bar. * * * The rule usually adopted under the Code provision, that the answer may set forth as many grounds of defense as the defendant may have, is that nonjoinder of a party may be pleaded together with matter in bar. The objection that there is a defect of parties must be presented in the answer in a clear and distinct manner. In analogy to a plea in abatement which must be so specific as to omitted parties as to give plaintiff a better writ, an answer setting up a defect of parties must state the omitted parties precisely and truly and facts should be alleged showing that they are necessary parties. * * * So an answer setting up nonjoinder of plaintiffs must distinctly set up such defense and specifically show wherein the defect consists and who should have been joined as parties." (31 Cyc. 219, 220, 221, and cases cited.)

In *Conklin v. Fox*, 3 Mont. 208, action was brought on an account for goods sold, alleging that Fox with two others were

partners. Service was had on Fox alone, and he filed his separate answer, denying the allegations of the complaint. It was contended by counsel, as here, that the question of misjoinder was raised by the answer, but the court held that, by his failure to plead the fact "appellant waived his objection to the misjoinder of the parties defendant," that the allegation of a partnership would be treated as surplusage, and that the entry of judgment against appellant alone was proper.

In the case of *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, the question was raised as to whether, under the rule stated above, the court could dispose of the subject matter of the suit in its entirety; the court held that: "Partners are joint tenants of all partnership effects; * * * joint tenants are not owners of separate shares. Each joint owner has title to the entirety. * * * I am, therefore, of opinion that where the defendant permits one or more of several joint tenants to sue alone * * * the recovery should be for the damages sustained by all the joint tenants."

Runkle was personally present and took part in the trial, asserting no rights therein and disclaiming any interest in the cattle; if a partner, he was a joint tenant with Church; and, Church having secured judgment for all damages sustained, Runkle could not thereafter maintain an action against appellant. As was said in the case of *Gilland v. Union Pac. Ry. Co.*, 6 Wyo. 185, 43 Pac. 508, the plea of misjoinder or nonjoinder of parties was regarded at common law, and is still regarded under the Codes as a dilatory defense of which, to be availing, timely advantage must be taken. If the facts established on the trial are true, defendant is in no worse position than he would be in an action by the joint tenants, and his substantial rights have not been affected. Having failed to plead a nonjoinder of parties plaintiff, defendant waived the objection, and the lower court was justified in disregarding his motion for a directed verdict, and in its refusal of the offered instructions on the subject.

We find no substantial error in the record, and the judgment and order of the district court are therefore affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MR. CHIEF JUSTICE BRANTLY, being absent, takes no part in the foregoing decision.

ACME HARVESTING MACHINE CO., RESPONDENT, v.
BENEDICT, APPELLANT.

(No. 4,139.)

(Submitted April 15, 1920. Decided May 24, 1920.)

[190 Pac. 287.]

Assignments for Benefit of Creditors — Action Against Assignor—Right of Creditors—Release from Debt—Receipt—Insufficiency.

Assignment for Benefit of Creditors—Status of Assignee.

1. An assignee for the benefit of creditors stands in the place of the assignor.

Same—Right of Creditor to Sue Assignor.

2. As at common law, so under the Revised Codes (secs. 6136-6161), the execution of an assignment for the benefit of creditors is no bar to an action by a creditor against the assignor, and in no way affects the right of the creditor to proceed to judgment after the assignment is made.

Same—Assignment Does not Discharge Debt.

3. An assignment, though made with consent of the creditors, does not effect the release of the assignor of any portion of his obligations not discharged by his assignee.

Same—Release of Creditor—Receipt—Insufficiency.

4. *Held*, that nothing short of an agreement expressing in clear terms the creditor's intention to accept the *pro rata* distribution of the assets in the hands of the assignee as a full discharge of the debt due him absolves the debtor, and that a receipt stating that the amount received by the creditor constituted the final dividend upon his account, "which account is hereby settled and closed, and the assignee is released from his trust, and finally discharged from his duties and obligations as such assignee," was not such an agreement.

Appeal from District Court, Fergus County; H. Leonard De Kalb, Judge.

ACTION by the Acme Harvesting Machine Company against M. J. Benedict. From a judgment for plaintiff and an order denying defendant a new trial, the latter appeals. Affirmed.

Mr. E. K. Cheadle and *Mr. John P. Swee*, for Appellant, submitted a brief; *Mr. Cheadle* argued the cause orally.

Messrs. Mettler & Briscoe, for Respondent, submitted a brief.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was instituted by respondent to recover the sum of \$247.03 for certain goods, wares and merchandise. Appellant admits the purchase of goods of the value of \$357.49, but defends the action upon the ground that he had executed a deed of assignment of all his property for the benefit of his creditors to Andrew J. Brower, as his assignee, and that all of his creditors consented in writing thereto. He alleges affirmatively that 30.9 per cent of \$357.49 was paid by the assignee and, by virtue of the acceptance of \$110.46 and the execution of a receipt by plaintiff, a complete release and discharge of the balance of the debt was accomplished. The receipt is as follows:

“The said sum being thirty and nine-tenths per cent (30 9/10%) final dividend upon our account, which account is hereby settled and closed, and said assignee is released from said trust, and finally discharged from his duties and obligations as such assignee.”

The plaintiff was awarded judgment against defendant for the sum of \$247.03, with interest and costs. The appeal is from the judgment and from an order denying defendant a new trial.

The receipt, appellant contends, constituted a full release of the original indebtedness and effectuated his complete dis-

charge of the original obligation. The answer of respondent to this is that the payment of \$110.46 by the assignee did not effect the discharge of the original indebtedness. The law [1] governing assignments for the benefit of creditors is covered by sections 6136-6161 of the Revised Codes; and, as at common law, the assignee stands in the place of the assignor. (*Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582.) The point raised on this appeal is settled adversely to appellant, by the overwhelming weight of authority. The rule applicable to the question now before us is stated in 5 Corpus Juris, section 275, page 1191, as follows: "As a right of action is given by law and cannot be destroyed by the voluntary act of the debtor, it is the rule that the right of a creditor to maintain an action against his debtor and to recover a personal judgment is not affected by the latter's voluntary assignment of all his property for the benefit of all his creditors; nor is such creditor's right to proceed to judgment defeated because he has filed his claim with the debtor's assignee."

The rule governing common-law assignments for the benefit [2] of creditors remains unaffected by our statutes, in so far as the question now before us is concerned. It is no longer open to question that the execution of a common-law assignment for the benefit of creditors is no bar to an action by a creditor against the assignor and in no way affects the right of the creditor to proceed to judgment after the assignment is made. (*Detroit Stove Works v. Osmun*, 74 Mich. 7, 41 N. W. 845.)

The assignment in question, assented to by the creditor [3, 4] though it may have been, did not effect the release of the assignor of any portion of his original obligation not discharged by the assignee. (5 Corpus Juris, 1285.) In *Howlett v. Mills*, 22 Ill. 341, it is held that the mere assent of a creditor that his debtor may make an assignment for the benefit of creditors does not release the original debt. There the court said: "The mere assent by a creditor, that his debtor may make an assignment for the benefit of his creditors, cannot

have the effect to release and discharge the debt, and this is what is asserted by this plea. It, at most, could only be held to require him to look to the fund for his portion to be applied on his claim, and leave him to collect the remainder out of the debtor." To the same effect is *Emerson v. Gerger*, 178 Mass. 130, 59 N. E. 666. In the case last cited, the assignment contained a provision that all creditors assenting to it thereby discharged all other claims against the debtor in consideration of the right of receiving the dividend from the assignee. It was there held that a subsequent receipt by the creditor of a check from the assignee purporting to be a final dividend intended to be accepted in full discharge of the creditor's claim, and use of the check by the creditor, are not enough to show an assent on his part to an agreement of composition, and the creditor was held to still have the right to sue the assignor and recover the balance of his claim. (5 Corpus Juris, sec. 480, pp. 1285, 1286.)

Our conclusion, therefore, is that nothing short of an agreement expressed in terms which indicated clearly the intention of the creditor to accept the *pro rata* distribution as a full discharge of his indebtedness could absolve the original debtor, and in our opinion the receipt above set forth is not such an agreement.

The judgment and order appealed from are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS
concur.

STATE EX REL. HART-PARR CO., RELATOR, v. DISTRICT
COURT, RESPONDENT.

(No. 4,638.)

(Submitted May 25, 1920. Decided June 1, 1920.)

[190 Pac. 982.]

*Supervisory Control—Default Judgments—Setting Aside—
Notice—Affidavit of Merits—Copy of Proposed Answer.*

Default Judgments—Setting Aside—Notice.

1. Under section 6589, Revised Codes, plaintiff was entitled to notice of defendants' motion to set aside their default; without such notice the trial court was without authority to set it aside.

Same—Affidavit of Merits—Copy of Proposed Answer.

2. *Held*, on supervisory control, that defendants' motion to set aside their default and permit them to answer on the ground of excusable neglect was insufficient in the absence of an affidavit of merits and a copy of their proposed answer.

Original application for writ of supervisory control on the relation of the Hart-Parr Company to annul an order of the District Court of Musselshell County setting aside a default judgment. Order annulled.

Mr. John McKenzie, for Relator, argued the cause orally.

Mr. Carl N. Thompson, for Respondent, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an original application to this court for an order, under its supervisory power, annulling an order of the district court of Musselshell county.

On February 4 of this year, in an action pending in the district court of Musselshell county in which the relator is [1, 2] plaintiff and Mike Kerzan and others are defendants, default was duly and regularly entered against all of the defendants for their failure to appear within the time allowed by law for that purpose. The purpose of the action is to ob-

tain a decree for the foreclosure of a mortgage held by the relator upon real estate situated in Musselshell county. Before the plaintiff applied to the court for the relief demanded, the defendants filed a motion asking that the default be set aside and that they be permitted to file their answer, on the ground that their failure to appear was due to their excusable neglect. The plaintiff was not given notice of the motion, nor was it supported either by an affidavit of merits containing a statement of facts constituting the defendants' defense or by a copy of the proposed answer. The plaintiff was entitled to notice of the motion. (Rev. Codes, sec. 6589.) In the absence of notice, the court had no authority to make the order. But, even if the notice had been given, the showing made in support of the motion was wholly insufficient. It was substantially the same as that considered in the recent case of *Crawford v. Pierse*, 56 Mont. 371, 185 Pac. 315. It was there held that, however meritorious the motion may have been in other respects, it was wholly insufficient to move the discretion of the court because of the absence of the affidavit of merits or a copy of the proposed answer.

For these reasons, the order is annulled.

Order annulled.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

STATE EX REL. BREEN, RESPONDENT, v. STODDEN, MAYOR,
APPELLANT.

(No. 4,541.)

(Submitted May 27, 1920. Decided June 1, 1920.)

[190 Pac. 991.]

*Cities and Towns—Police Department—Metropolitan Police
Law—Illegal Removal of Officer—Restoration—Mandamus—
Judgments—Satisfaction—Dismissal of Appeal.*

Judgments—Satisfaction—Dismissal of Appeal.

1. Where, in obedience to a judgment in *mandamus* directing the restoration of an officer of the police department, the officer is restored to his position the appeal of the city from the judgment will be dismissed.

Metropolitan Police Law — Removal of Officer — Restoration — Ratification.

2. *Quære*: Where a city attorney, without authority so to do, ordered the restoration of a member of the police force, did the mayor by signing salary warrants of the officer thereafter, pending appeal from a judgment in *mandamus* ordering restoration, ratify the restoration?

Same—Retirement of Officers—Power of Council.

3. Though, under the Metropolitan Police Law, members of the police department in a city cannot be dismissed except for cause and after a hearing or trial, the city council has authority to retire a member or any number of members of the department to the eligible list on a determination in good faith that their services are not required.

Same—Removal of Officer on Ground of Economy and Appointment of Another Illegal.

4. Where, under the provisions of the Metropolitan Police Law, a city council had by ordinance created the offices of city jailer and two assistant jailers and did not thereafter vacate any one of these offices, it had no power, after retiring one of such assistants and placing him on the eligible list on the ground of retrenchment, to continue the office in operation and put another in charge of it.

[On power of town or municipality to remove officer in absence of statutory authority, see notes in 9 L. R. A. (n. s.) 572; 39 L. R. A. (n. s.) 519.]

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

Mandamus by the State, on the relation of Peter T. Breen, against the Mayor of the City of Butte, William T. Stodden,

incumbent. From a judgment awarding a peremptory writ, defendant appeals. Affirmed.

Mr. R. L. Clinton and *Mr. C. F. Juttner*, for Appellant, submitted a brief; *Mr. Clinton* argued the cause orally.

Messrs. Maloney & Andrew, for Respondent, submitted a brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Respondent Breen, hereafter for convenience called the plaintiff, instituted proceeding in *mandamus* against appellant, hereafter referred to as the defendant, to compel his restoration as assistant city jailer in the police department of Butte. This appeal is from the judgment of the district court awarding the peremptory writ, filed and entered September 14, 1919. The bill of exceptions herein was settled October 14, 1919.

On March 25, 1920, plaintiff filed in this court a motion to dismiss the appeal on the ground that defendant had fully complied with the writ and satisfied the judgment. In support of this motion he filed, on May 25, 1920, affidavits to the effect that on September 14, 1919, the very day of the issuance of the writ, R. L. Clinton, city attorney and counsel for defendant, notified plaintiff to return, and instructed the city jailer to return plaintiff to his position, which was done, and he has ever since retained the position and received his monthly warrants signed by the defendant mayor.

If plaintiff was restored to his position by the mayor, acting [1] within his authority and in obedience to the peremptory writ, the matter comes within the rule laid down in the case of *In re Black's Estate*, 32 Mont. 51, 79 Pac. 554, the motion should be sustained, and this appeal dismissed. However, neither the record nor the motion papers show a return of the writ or any action taken by the defendant in obedience thereto; the city attorney was without authority to direct the restoration of the officer, and it is at least questionable whether

[2] the signing of salary warrants by the mayor, while the appeal was pending, would constitute a ratification of the return of the officer to his position. The question may be raised at any time; and, if this appeal is dismissed without a determination on the merits, further litigation would result or the legal status of the respective parties be left in doubt. We deem it proper, therefore, to pass, without determining the question presented by the motion, to a consideration of the case on its merits.

The undisputed facts are that plaintiff was a duly appointed and qualified member of the police department of the city of Butte, and, having served the probationary period of six months, under the Metropolitan Police Law, as assistant city jailer, that he was, on the sixteenth day of April, 1919, permanently appointed by the defendant to that position; and that he thereupon gave his bond in the sum of \$2,500 for the faithful performance of his duties. On May 28, 1919, the mayor, finding the shrinkage in the city's finances, through discontinuance of the liquor licenses, amounting to some \$65,000 per annum, increase in wages and costs of materials, made retrenchment imperative, and that, owing to the closing of the saloons and, perhaps, other causes, the city could well dispense with practically one-third of the police force recommended to the council the placing of twenty members of the police department on the eligible list, without pay until reinstated by the council. The council accepted the recommendation, and passed a resolution to that effect, embodying their reasons for so doing in the resolution, and placing on the list the twenty men last appointed to the police department, among them, the plaintiff.

While it is true that under our statute (Rev. Codes, sec. [3] 3306), a member of the police department cannot be dismissed except for cause and after a hearing or trial (sec. 3308; *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695), there can be no doubt at this time of the authority of the city council to retire a member, or any num-

ber of the members, of the police department to the eligible list, on a determination, in good faith, that the necessities of the city do not require their services. The city council has control over the affairs of the city, and has not only authority, but it is its duty, to see that those affairs are economically administered, and that there shall be no useless expenditure of the city's funds.

It can be readily understood that, in many instances, especially in those cities dependent largely for their prosperity and population on mining operations, and where consequently, the needs as to police protection fluctuate frequently, the officials upon whom rests this duty to protect the city's finances must, of necessity, be vested not only with power to increase the police force to meet either growing or sudden demands, but to thereafter reduce the force, with a decrease of the demands, by retiring to the eligible list those members of the force last appointed and whose services are no longer needed. This question has been fully disposed of in the cases of *State ex rel. Rowling v. Mayor of Butte*, 43 Mont. 331, 117 Pac. 604, and *State ex rel. Dwyer v. Duncan*, 49 Mont. 54, 140 Pac. 95. It is therefore clear that, if the plaintiff was merely a patrolman and one of the number thus, for economic reasons, retired to the eligible list, he has no just cause of complaint, even though his particular work is performed by some member of the force still retained.

The position of jailer is one which might, we assume, be filled by any patrolman, and the council might properly have provided that a certain number of patrolmen be from time to time assigned to act as jailers, just as they are to the "plain clothes squad," the traffic force, or any particular beat. This, however, was not done, but the council, in 1908, in conformity with the Metropolitan Police Law, established the police department, with all its divisions and offices, by special ordinances, among which we find Ordinance 823, which reads in part as follows: "The offices of city jailer and two assistant city jailers are hereby created and each of them are hereby

constituted as members of the police department." Thus we have the creation of three distinct "offices" within the police department; no one of these offices was vacated by the council by its resolution of retrenchment; but we find from the record that immediately upon the retirement of plaintiff, a patrolman, older in point of service, was called in to take his office. This being the condition of affairs in the police department of the city of Butte, the council was without authority of law to remove plaintiff from his office and place another in his stead.

Again, the question presented is disposed of by the opinion in *State ex rel. Dwyer v. Duncan, supra*. We see no distinction between the position of a lieutenant of police and an assistant city jailer, where each position is created and denominated an "office" by the ordinance. While the office might be vacated for economic purposes, it cannot, under the civil service principle of the Metropolitan Police Law, be continued in operation, the incumbent removed therefrom, and another placed in charge.

The judgment of the district court of Silver Bow county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
JUNE TERM, 1920.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,	}	Associate Justices.
THE HON. JOHN HURLY,		
THE HON. JOHN A. MATTHEWS,		
THE HON. CHARLES H. COOPER,		

**TUTTLE, RESPONDENT, v. PACIFIC MUTUAL LIFE
INSURANCE CO., APPELLANT.**

(No. 4,167.)

(Submitted June 3, 1920. Decided June 25, 1920.)

[190 Pac. 993.]

Accident Insurance—Death—Notice—Waiver—Burden of Proof
—“Accident”—Definition—Liability of Insurer—Evidence
—Insufficiency.

Accident Insurance—Death—Written Notice—Insufficiency.

1. Under a provision in an accident insurance policy requiring immediate written notice, with full particulars of accidental death, to the insurer at its home office, it was incumbent upon the beneficiary, or someone acting in her behalf, within a reasonable time after the disappearance of the insured during a snowstorm while

on a hunting trip in the mountains, to give some notice of the manner in which he met his death, she being convinced of his death a few days after the accident, although the remains were not found until some three years thereafter, and notice given seven months after knowledge thereof was insufficient.

[As to notice of accident within time required by terms of accident insurance policy as condition precedent to recovery, see note in *Ann. Cas.* 1914D, 412.]

Same—Written Notice to Home Office—Oral Notice to Agent Insufficient.

2. The requirement of immediate written notice to the home office of the insurer, of the accidental death of insured, held not to have been met by notice to the local agent of defendant during the course of an informal conversation.

Same—Waiver.

3. Where an insurance policy contains a provision against waiver by an agent of the insurer, it is both notice to and agreement by the policy-holder that no agent has authority to waive any of its conditions.

Same—Waiver—What Does not Constitute.

4. Letters in which insurer, among other things, denied liability on the ground that the requirement as to notice had not been met and in which it was expressly stated that nothing therein was to be construed as a waiver, *held* incapable of construction as a waiver.

Same—Waiver—Unreasonable Provision.

5. *Quære*: Is a provision in an insurance policy that no waiver shall be valid unless in writing from the home office and signed by its president or vice-president, and the secretary or assistant secretary, a reasonable one?

Same—Manner of Death—Burden of Proof.

6. In an action to recover on a policy under which the liability of the insurer is specifically limited to insurance against death by accident resulting from bodily injuries and caused solely by external, violent and accidental means, independent of all other causes, within ninety days after the injury, the plaintiff has the burden of proving not only that death ensued, but also that it was caused as provided in the policy and occurred within the time limited after the injury.

Same—"Accidental" Death—Definition.

7. Where, in the act which precedes an injury resulting in death, something unforeseen or unusual occurs which produces the injury, the injury is accidental within the meaning of an accident policy; death resulting from voluntary physical exertion, from intentional acts of the insured, from disease, or from the vicissitudes of climate or atmosphere not falling within the definition.

Same—Accidental Death of Insured—Evidence—Insufficiency.

8. Evidence that insured who, while on a hunting trip, left camp in a snowstorm and perished, his remains being found about three years thereafter, two miles from camp, at a place where he could not have fallen to his death, his rifle not being near the body and a pistol being in his pocket, *held* to have been insufficient to show that death resulted from external, violent and accidental means within the meaning of an accident insurance policy, there being no presumption that he met death by such means.

Appeal and Error—Judgment Unsupported by Evidence—Reversal.

9. A judgment based upon a finding of the district court, in an action on an insurance policy tried by it without a jury, unsupported by evidence, will be reversed.

[On the question as to when strict compliance with requirements as to time of notice in accident or health policy is excused, see notes in 18 L. R. A. (n. s.) 109; 27 L. R. A. (n. s.) 319.]

Appeal from District Court, Jefferson County; Joseph C. Smith, Judge.

ACTION by Mattie A. Tuttle against the Pacific Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Messrs. Day & Mapes, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

The burden of proof was upon the plaintiff to show not only the disappearance or even the death of the assured, but also that the death was caused by violent, accidental, and external means, independent of any other cause within ninety days of the injury. The plaintiff must not only show death, but death resulting from accident within the meaning of the policy. (*Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175; *Rock v. Travelers' Ins. Co.*, 172 Cal. 463, L. R. A. 1916E, 1196, 156 Pac. 1029; *Vernon v. Iowa State Travelers' Assn.*, 158 Iowa, 597, 138 N. W. 696; *Schmohl v. Travelers' Ins. Co.* (Mo. App.), 177 S. W. 1108; *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 130 Am. St. Rep. 269, 25 L. R. A. (n. s.) 1256, 88 N. E. 550; *Wright v. Order of United Commercial Travelers' etc.*, 188 Mo. App. 457, 174 S. W. 833; *Laessig v. Travelers' Protective Assn.*, 169 Mo. 272, 69 S. W. 469; *Smith v. Travelers' Ins. Co.*, 219 Mass. 147, L. R. A. 1915B, 872, 106 N. E. 607; *Rock v. Travelers' Ins. Co.*, 172 Cal. 463, L. R. A. 1916E, 1196, 156 Pac. 1029.)

In the case of *Pledger v. Business Men's Acc. Assn.* (Tex. Civ.), 197 S. W. 889, the supreme court of Texas in speaking of the distinction between "accidental death" and "death

by accidental means," says: "Where death is caused by some act of the deceased not designed by him, or not intentionally done by him, it is death by accidental means. In other words, accidental death is an unintended and undesigned result, arising from acts done; death by accidental means is where the result arises from acts unintentionally done." The policy in suit provides that the death must have resulted from bodily injuries caused by accidental means.

"Death, engendered by exposure to heat, cold, damp, the vicissitudes of climatic or atmospheric influence, cannot, we think, properly be said to be accidental unless at all events the exposure is itself brought about by circumstances which may give it the character of accident." (*Sinclair v. Maritime Passengers' Assur. Co.*, 3 El. & El. 478, 121 Eng. Reprint, 521; *Dozier v. Fidelity & Casualty Co.*, 46 Fed. 446, 13 L. R. A. 114; *Elsey v. Fidelity & Casualty Co.* (Ind. App.), 109 N. E. 413; *Schmid v. Indiana etc. Acc. Assn.*, 42 Ind. App. 483, 85 N. E. 1032; *Stone v. Fidelity & Casualty Co.*, 133 Tenn. 672, Ann. Cas. 1917A, 86, L. R. A. 1916D, 536, 182 S. W. 252; *Morse v. Commercial etc. Acc. Assn.*, 212 Mass. 140, 40 L. R. A. (N. S.) 135, 98 N. E. 599.)

The requirement of the policy that immediate notice shall be given is a condition precedent to the creation of liability or the life of the promise; or, to put it perhaps in a better way, the giving of the notice is one of the essentials of the cause of action. (*Hatch v. United States Casualty Co.*, 197 Mass. 101, 125 Am. St. Rep. 332, 14 Ann. Cas. 290, 14 L. R. A. (n. s.) 503, 83 N. E. 398.) There is a class of cases which hold that where death results from the accident no notice of the accident need be given, provided that notice of the death be given. (*Western Commercial Travelers' Assn. v. Smith*, 85 Fed. 401, 40 L. R. A. 653, 29 C. C. A. 223; *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846, 63 L. R. A. 425, 72 Pac. 1028.) It will be noted, however, that these are cases of accidents apparently harmless, resulting in disease from which death later follows. The lan-

guage of the opinions must be interpreted having in view the circumstances to which it relates. There is another class of cases which hold that the time within which notice must be given does not begin to run until the discovery of the facts upon which the claim is based. (*Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 37 Am. St. Rep. 529, 22 L. R. A. 432, 35 N. E. 316; *Munz v. Standard L. A. Ins. Co.*, 26 Utah, 69, 99 Am. St. Rep. 830, 62 L. R. A. 485, 72 Pac. 182; *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 13 Am. St. Rep. 109, 18 L. R. A. (n. s.) 109, 96 Pac. 982.) There is also a class of cases where some obstacle intervenes such as insanity, preventing the giving of notice, and it is held that in such cases the time within which notice was to be given does not begin to run until the removal of the obstacle. (*Woodmen Acc. Assn. v. Pratt*, 62 Neb. 673, 89 Am. St. Rep. 777, 55 L. R. A. 291, 87 N. W. 546; *Behlmer v. Grand Lodge*, 109 Minn. 305, 26 L. R. A. (n. s.) 305, 123 N. W. 1071.) But all of these cases are distinguishable from the present case, in this, that the evidence of the death from accidental causes of the assured consists of the facts surrounding his disappearance and the storm, which facts were as well known in November, 1910, as they were in June, 1911. The subsequent discovery of the body was merely confirmatory evidence of the circumstances upon which the claim is based. If the time for giving notice ran from the discovery of the body, then notice was not given at all within the meaning of the provisions of the policy.

Failure to give notice of loss within a reasonable time as required by the term of the policy is not waived by the subsequent denial of all liability on the ground that the loss is not covered by the policy. (*Aetna Life Ins. Co. v. Fitzgerald*, 165 Ind. 317, 112 Am. St. Rep. 232, 6 Ann. Cas. 551, 1 L. R. A. (n. s.) 422, 75 N. E. 262.) In order to constitute a waiver of proof of death there must be a denial of liability upon other grounds than failure to make proof before the time has expired within which proofs of death might be made within the terms of the policy. (*Burlington Ins. Co. v. Ross*,

48 Kan. 228, 29 Pac. 469; *State Ins. Co. v. School District*, 66 Kan. 77, 71 Pac. 272; *Continental Ins. Co. v. Chance*, 48 Okl. 324, 150 Pac. 114.) If the plaintiff failed to give notice of the accident within a reasonable time, or failed to make the affirmative proof of death required by the policy, the denial of liability by the company thereafter would not constitute a waiver. (*Employers' Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. 232, 35 S. W. 869.)

Messrs. D. M. and J. E. Kelly submitted a brief in behalf of Respondent; *Mr. J. E. Kelly* argued the causes orally.

The rule seems to be that where the effect is the natural and probable consequence of an act, it cannot be said to be produced by accidental means. (1 Corpus Juris, 426; *United States Mut. Acc. Assn. v. Barry*, 131 U. S. 100, 33 L. Ed. 60, 9 Sup. Ct. Rep. 755 [see, also, Rose's U. S. Notes]; *Hastings v. Travelers' Ins. Co.*, 190 Fed. 258.) But when it is not the natural and probable consequences, the rule is different and it is considered accidental. (1 Corpus Juris, 427; *Travelers' Assn. v. Insurance Co.*, 10 Manitoba, 537.)

The assured came to his death by exposure, the exposure coming about by his being lost; hence the cause of his exposure was accidental. (1 Corpus Juris, 432; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620, 7 C. C. A. 581; *United States Mut. Acc. Assn. v. Hubbell*, 56 Ohio St. 516, 40 L. R. A. 453, 47 N. E. 544; *Travelers' Ins. Co. v. Rosch*, 23 Ohio C. C. 491; Fuller on Accident Insurance, 37.)

It was impossible for plaintiff to present notice of accident or proof of injury or death, because under the peculiar circumstances of this case it was impossible to be certain that death had ensued or to be aware of the particulars of the accident. Consequently the time for serving notice of accident and proof of death did not begin to run until the date of the discovery of death or of such particulars. (1 Cyc. 274, 374; Fuller on Accident Insurance, 377; *Kentzler v. American*

Mut. Acc. Assn., 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002; *Trippe v. Provident Fund Society*, 140 N. Y. 23, 37 Am. St. Rep. 529, 22 L. R. A. 432, 35 N. E. 316; *Peele v. Provident Fund Society*, 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 13 Am. St. Rep. 109, 18 L. R. A. (n. s.) 109, 96 Pac. 982; *Pacific Mutual Life Ins. Co. v. Adams*, 27 Okl. 496, 112 Pac. 1026; *Ewing v. Commercial Travelers' Mut. Acc. Assn.*, 170 N. Y. 590, 63 N. E. 1116.)

On the question of notice of accident, the better rule seems to be that it applies only to the assured and not to the beneficiary; hence it is our position that plaintiff was not estopped from enforcing her claims under the policy for the reasons: (1) That as beneficiary, she had no right or title under the same by the mere happening of the accident, her right thereunder being inchoate until the death of the insured could be established by satisfactory proof, and therefore she could not give notice of the accident until the death of the assured. (Fuller on Accident Insurance, 389, 390; *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 98 Am. St. Rep. 846, 63 L. R. A. 425, 72 Pac. 1028.) (2) Under the particular wording of this policy, two classes of notices are required—the one to be given by the assured, the other by the beneficiary within a certain time after death where the accident results fatally. (*Western Commercial Assn. v. Smith*, 85 Fed. 401, 40 L. R. A. 653, 29 C. C. A. 223; *Odd Fellows Fraternal Acc. Assn. v. Earl*, 70 Fed. 16, 16 C. C. A. 596; 1 Corpus Juris, 474.) (3) Under the policy and the construction urged by the defendant, plaintiff's rights as beneficiary would be practically nullified in this case, and in all cases where the assured does not become disabled until some time after the date of the accident or until the period of giving the notice of injury has expired. (*Crotty v. Continental Casualty Co.*, 163 Mo. App. 628, 146 S. W. 833; *Maryland Casualty Co. v. Burns*, 149 Ky. 550, 149 S. W. 867.)

Compliance with the conditions of the policy requiring the claimant to furnish notice and proofs of death or injury, as well as any defects in the notice or proofs, may be waived by the insurer. (*Hurt v. Employers' Liability Assur. Corp.*, 122 Fed. 828; *Preferred Accident Insur. Co. v. Fielding*, 35 Colo. 19, 9 Ann. Cas. 916, 83 Pac. 1013; *Fidelity & Casualty Co. v. Cooper*, 137 Ky. 544, 126 S. W. 111; *Da Rin v. Casualty Co.*, 41 Mont. 175, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.) 1164, 108 Pac. 649.)

The beneficiary will be excused from furnishing proofs of death where, upon notice to the insurer requesting blank forms, the company either refuses to provide the necessary blanks or delays sending them until after the time has elapsed within which, under the policy, the final proofs must be made. (*Standard Life & Acc. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; *Union Casualty etc. Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677; *Metropolitan Casualty Ins. Co. v. McAuley*, 134 Ga. 165, 67 S. E. 393; *National Masonic Acc. Assn. v. McBride*, 162 Ind. 379, 70 N. E. 483; Fuller on Accident Insurance, 414.)

The calling for other information denying liability on other grounds is sufficient proof of a waiver and amounts to an estoppel. (1 Cyc. 278, 279.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought by plaintiff on an accident policy carried by her son, Ora Tuttle. The case was tried to the court sitting without a jury, and resulted in a judgment in favor of the plaintiff for the amount of the policy.

The undisputed facts are as follows: In 1908 Ora Tuttle was insured by defendant company "against the effects of bodily injuries sustained during the term of this policy and caused solely by *external, violent and accidental means*.
* * * And if death shall result from such injuries within ninety days, independent of all other causes, the company will

pay the principal sum of fifteen hundred dollars." The policy was in full force and effect throughout the year 1910. In November of that year, Ora Tuttle, his brother R. S. Tuttle, and three other young men went into the park district in Gallatin county on a hunting trip, and established a camp at Grayling. On the morning of the 21st Ora Tuttle left camp alone on the trail of an elk; it was then snowing hard, and a man could not be distinguished at a hundred yards. The storm continued throughout the day and night, the temperature remaining slightly below the freezing point, not cold enough to freeze a person out in the storm. The next day was fairly pleasant, but squally, and ten to twelve inches of snow had then fallen. The second day a heavy storm broke, and continued for eight or ten days, and the snow then appeared to be several feet deep. On leaving camp, Tuttle took with him a rifle, an automatic pistol, and provisions sufficient for the day. As night approached and he did not return, his companions instituted a search for him, building signal fires and discharging their rifles, but without receiving any response. The search was continued until the following February, but no trace of the missing man was found. On October 2 or 3, 1913, his remains were found in a small park about two miles from the location of the camp. A small canyon intervened, necessitating a detour, requiring one to travel approximately five miles from the camp to the place where the remains were found. R. S. Tuttle identified the clothing and shoes as those of Ora Tuttle. His watch was still in the vest pocket and his automatic in the trousers pocket; the rifle was nowhere in the vicinity. Only the larger bones of the body remained; most of these were with the clothing. The skull, however, was found in the shallow gulch some 30 feet distant and the shoes Tuttle had worn were found near the skull. There was no cliff or other point from which deceased could have fallen to his death. The remains were taken to Whitehall, and on the ninth day of October, 1913, were buried.

The plaintiff testified that shortly after the disappearance of Ora Tuttle she had a conversation with the local agent of the company and that "I asked him if the boy was dead if I would have to write the company for proofs—for blanks anyway. He said no, he would attend to that himself. And then I asked him if I would have to keep his payments up. He said no, I would not have to do that. He assured me that he did not think the boy was dead; that he thought he would come home after a little."

On June 19, 1911, Ike E. O. Pace, Esq., an attorney at Whitehall, notified the company by letter of the disappearance of Tuttle and of the search made for his remains, and closed with the statement: "There is no doubt, however, that the young man is dead, and probably was either accidentally shot or received some serious fall, or was attacked by some wild animal which accident resulted in his death."

On October 20, 1913, plaintiff notified the local agent in writing of the finding of the body, and requested instruction as to what was required of her as to "proof and statement." The letter was forwarded to and answered by the head office, to the effect that the last policy carried by Ora Tuttle was in 1910, and that "the conditions of it are such that it would appear that no claim exists thereunder." The plaintiff replied, reciting her conversation in 1910 with the local agent, and stating that she would be glad to hear further from the company. Thereafter, on January 30, 1914, J. L. Wines, Esq., an attorney, took the matter up with the company, and was advised in writing that "It appears impossible to show the manner of such death. Such being the fact, it is impossible to determine whether the case falls within the terms of the policy, said policy being one of limited liability. Furthermore, it appears from an examination of the files that the provisions of the contract in regard to giving notice and submitting proofs have not been complied with. You will, of course; understand that the action of the company in writing you as

above is not to be construed as a waiver or impairment of any defense which it may have to any action upon the policy."

The amended complaint alleges that "Ora Tuttle came to his death by bodily injuries sustained, caused by external, violent, and accidental means, and resulting in his death and disability, independent of all other causes." It then recites the facts, substantially as hereinbefore stated. It then alleges the conversation with the local agent and the subsequent writing of the letter referred to above, with the contents, but continuing, "and asking him if he would look after the matter as he said he would." This latter request does not, however, appear in the letter which was introduced in evidence. The complaint then alleges the notice of June 19, 1911, and, after stating the contents, avers that plaintiff "At the same time requested that proper blanks be forwarded to her to make the necessary written affirmative proof of death." The letter, also introduced in evidence, does not contain the request quoted above from the complaint.

The complaint further alleges that notice of death was given and liability denied within the 120 days as required by the policy, "after ascertaining the fact of death"; that defendant failed, neglected and refused to furnish the blanks, and plaintiff was unable, therefore, to furnish the proof required, and was thereby excused from furnishing other proof than that submitted, and that defendant waived any advantage that it might have claimed by reason of the failure of plaintiff.

The defendant demurred to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, pointing out the failure to state in what manner the injuries were sustained, or that they were caused by external, violent and accidental means; that the complaint shows a failure to give the required notices, and does not state facts sufficient to constitute a waiver. The demurrer was overruled, and defendant answered, and thereafter the cause was tried to the court sitting without a jury. The plaintiff having rested, defendant moved the court to find the issues in

its favor, which motion was denied. The defendant introduced no evidence, and the court made its findings, to the effect that Ora Tuttle came to his death by external, violent, and accidental means on or about the twenty-second day of November, 1910, at which time he was insured in defendant company, and that plaintiff was his beneficiary; that the facts did not come to the knowledge of plaintiff until October, 1913, and in the interim plaintiff did not know the actual fate of Ora Tuttle, or that he was in fact dead; that after the discovery of his death, and within the time provided in the policy, plaintiff duly notified defendant of the death; that the amount of the policy was due and payable January 30, 1914, at which time defendant refused payment. The court thereupon recited its conclusions of law that the plaintiff was entitled to a judgment, and entered judgment accordingly. The appeal is from the judgment.

The specifications of error herein are that the court erred in (1) overruling the demurrer to the amended complaint; (2) refusing to grant the motion to find the issues for defendant; (3) finding that Ora Tuttle came to his death by external, violent and accidental means on or about November 22, 1910; and (4) finding as a conclusion of law that plaintiff was entitled to judgment.

1. In overruling the demurrer the court evidently considered the general allegations of the complaint sufficient, to be thereafter aided by proof of specific facts, and disregarded the recitation of evidence as surplusage. The case was thereafter tried, and all the facts, concerning the death of Tuttle, that could possibly be developed were brought out. No good purpose could now be served by a new trial, and we are of the opinion that the matter should be disposed of on its merits. We will therefore pass, without deciding, the question of the correctness of the court's ruling on the demurrer.

2. The motion to find the issues in favor of the defendant is based on the ground of alleged insufficiency of the evidence to establish (a) that death resulted from injuries sustained,

caused solely by external, violent and accidental means; (b) that immediate written notice of the accident was given in accordance with the terms of the contract; or (c) that written affirmative proof of death by such means was made within the time required by the terms of the contract; or (d) that there was a waiver of such conditions by the company. The grounds designated (a), (b) and (c), are so closely allied that they will be considered together.

The policy here under consideration contains the following provisions:

“6. The claimant must deliver to the company at its home office in Los Angeles, California, immediate written notice of any accident, with full particulars and name and address of insured, and deliver to the company at its said home office written affirmative proof of such injuries or death and whether said injuries or death were caused by external, violent and accidental means within the terms of this policy; and so furnish such proof as to death * * * within one hundred and twenty days from time of accident; or no claim shall arise or be valid.”

“9. No alteration or waiver of the conditions or provisions of this policy or said application shall be valid unless in writing at the company's home office and signed by the president or vice president and also the secretary or assistant secretary; nor shall notice to or knowledge of any person of anything not written in said application be held to effect a waiver or estoppel upon the company, or affect the provisions of this contract.”

While, in this state, “time is never considered as of the [1] essence of a contract, unless by its terms expressly so provided” (Rev. Codes, sec. 5047), and “any succinct and intelligent statement, giving the information called for by the stipulation in the policy, whether verified or not, or whether by eyewitness or not, is sufficient to put the insurer upon inquiry to determine whether he is liable” (*Da Rin v. Casualty Co.*, 41 Mont. 175, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.)

1164, 108 Pac. 649), under the above-quoted provision 6 some notice, "with full particulars and the name and address of insured," should have been given to the company at its "home office." And while the beneficiary did not know, immediately after the accident, the exact facts concerning the manner in which insured had met his death, she was, within a reasonable time after his disappearance, fully convinced of his death, and, under the terms of the contract, either she, or someone acting in her behalf, should have given the required notice to the company at its home office.

In the absence of proof that the facts related were communicated to the home office, notice to the local agent during the informal conversation held shortly after the disappearance of Ora Tuttle, could not, under any circumstances, be held to meet the requirement of the contract that immediate notice be given to the "*company at its home office.*" As was said in *Hatch v. United States Casualty Co.*, 197 Mass. 101, 125 Am. St. Rep. 332, 14 Ann. Cas. 290, 14 L. R. A. (n. s.) 503, 83 N. E. 398: "The promise to insure is not absolute but conditional. The condition is that the notice, whatever it may be and by whomsoever or whenever given shall be given. It is a condition precedent to the creation of liability or the life of the promise; or, to put it perhaps in a better way, the giving of the notice is one of the essentials of the cause of action. * * * If it be said, as it sometimes is, that such a defense is purely technical, the answer (if one is needed) is that the provision for notice is of the essence of the contract, that it is manifestly an important provision for the protection of the insurer against fraudulent claims, and also against those which, although made in good faith, are not valid. It is a provision which tends to the elucidation of the truth when the claim for indemnity is made. It was one to which the insured agreed, and it is not unreasonable."

The giving of the notice of the accident, and the forwarding of affirmative proof of death, are two separate and distinct obligations. Under the circumstances of this case, the latter

obligation could not be met until after the discovery of the body and a determination of the cause of death, if it was then possible; but the fact of the accident, if any, with its attendant circumstances, was known to plaintiff within a few days after the disappearance, but no notice thereof was given until June 19, 1911, nearly seven months thereafter.

In the case of *Foster v. Fidelity & Casualty Co.*, reported in 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69, it was held that where the beneficiary satisfied herself after investigation that her son's death was accidental, but did not give notice until twenty-nine days thereafter, she did not bring herself within the requirement of "immediate notice."

There is a class of cases which holds that the time within which notice must be given does not begin to run until the discovery of the facts upon which the claim is based. (*Trippe v. Provident Fund Society*, 140 N. Y. 23, 37 Am. St. Rep. 529, 22 L. R. A. 432, 35 N. E. 316; *Munz v. Standard L. A. Ins. Co.*, 26 Utah, 69, 99 Am. St. Rep. 830, 62 L. R. A. 485, 72 Pac. 182; *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 13 Am. St. Rep. 109, 18 L. R. A. (n. s.) 109, 96 Pac. 982. But these cases are of little assistance here; for leaving out the question of death, with which this preliminary notice is not concerned, the facts relating to the accident, if any, were known to plaintiff at the time she was notified of the loss of her son in a storm.

The plaintiff contends that she was not required to give notice until after the establishment of the fact that the assured was dead. If this were true, no such notice as is required by the terms of the contract was ever given, as it would exclude the letter of June 19, 1911, which contained the only written notice furnished the company at any time, attempting a recital of the facts. There is no evidence of a compliance with the requirement of written affirmative proof of death; the letter of October 20, 1913, written to the local agent, but forwarded to the home office, goes no further than to state that the "remains of my son Ora Tuttle have been

found." What communication was made by Attorney Wines is not disclosed, and appears to have been made orally, while the stipulation in the contract is that it be made in writing, and was made more than three months after the discovery of the body.

As to waiver, the insurer and the insured mutually agreed [3] that "no waiver. * * * shall be valid unless in writing at the home office and signed by the president or vice president and also the secretary or assistant secretary." Where the policy contains a provision against waiver by an agent, it is both notice to and agreement by the policy-holder that no agent of the company has authority to waive the condition. (*Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092; *Travelers' Ins. Co. v. Meyers*, 62 Ohio St. 529, 49 L. R. A. 760, 57 N. E. 458.)

Three letters, admittedly coming from the home office, were [4, 5] introduced, and the material parts of their contents have been heretofore quoted. No one of these letters is signed as provided for in the policy; but we shall not pass upon the question as to whether such requirement is reasonable or not, as, in our opinion, nothing contained in the letters could constitute a waiver, even though signed.

3. The first ground mentioned in the motion for findings in favor of the defendant, and the third and fourth assignments of error, are based on the lack of evidence to establish death by external, violent and accidental means.

The evidence, heretofore quoted, establishes the fact of death, but the manner in which the insured met his death is [6] left entirely to conjecture. The policy on which the action was brought is not an ordinary life insurance policy, but an accident policy, in which the liability of the company is specifically limited to insurance "against the effect of bodily injuries sustained during the term of the policy, and caused solely by external, violent and accidental means," and, under the terms of which, "if death shall result from such injuries within ninety days, independent of all other causes, the com-

pany will pay the principal sum of fifteen hundred dollars." The burden of proof was upon the plaintiff to show, not only the death of the insured, but also that the death was caused by injuries sustained by the insured by external, violent, and accidental means, and resulted within ninety days after the injury. In other words, the plaintiff must not only show death, but death resulting from accident within the meaning of the policy. (*Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 147 Pac. 1175; *Rock v. Travelers' Ins. Co.*, 172 Cal. 463, L. R. A. 1916E, 1196, 156 Pac. 1029; *Vernon v. Iowa State T. Assn.*, 158 Iowa, 597, 138 N. W. 696; *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 130 Am. St. Rep. 269, 25 L. R. A. (n. s.) 1256, 88 N. E. 550; *Wright v. Order of United Commercial Travelers' etc.*, 188 Mo. App. 457, 174 S. W. 833; *Laessig v. Travelers' Prot. Assn.*, 169 Mo. 272, 69 S. W. 469; *Hatch v. United States Casualty Co.*, 197 Mass. 101, 104, 125 Am. St. Rep. 332, 14 Ann. Cas. 290, 14 L. R. A. (n. s.) 503, 83 N. E. 398; *Smith v. Travelers' Ins. Co.*, 219 Mass. 147, L. R. A. 1915B, 872, 106 N. E. 607.)

In the case of *Laessig v. Travelers' Prot. Assn.*, *supra*, the court said: "The proof of accidental death is the essential prerequisite and condition precedent to the right to recover on an accident insurance policy. This is the distinguishing feature between accident policies and ordinary life policies. In the latter, to make out a *prima facie* case it is only necessary for the plaintiff to show the contract after the death, * * * whereas, in the former, the condition precedent to a recovery is not simply the natural death, but the death from accident. Hence in suits upon accident policies the burden of proof is upon the plaintiff (subject to the limitation that it is not presumed as a matter of law that the deceased took his own life or was murdered) to show that the death was caused by external violence and by accidental means. This is exactly what the policy or contract itself provides. And this is the rule laid down by Mr. Justice Harlan, in the supreme court of the United States, in *Travelers' Ins. Co. v. McConkey*, 127 U. S.

661, 32 L. Ed. 308, 8 Sup. Ct. Rep. 1360 [see, also, Rose's U. S. Notes]. * * * As mere proof of injury in a damage case will not entitle plaintiff to recover, but negligence of the defendant must be shown, so in a suit upon an accident policy mere proof of injury or death will not entitle the plaintiff to recover, but the injury or death must be shown to be due to an accidental cause."

There is a clear distinction between accidental death and death by accidental means; the latter only is covered by the policy. Thus in *Smith v. Travelers' Ins. Co.*, *supra*, we find the rule stated as follows: "It is not sufficient that the death or the illness that caused the death may have been an accidental result of the external cause, but that cause itself must have been, not only external, and violent, but also accidental [citing a long list of authorities]. The word 'accident,' in accident policies, means an event which takes place without one's foresight or expectation. A result, though unexpected, is not an accident; the means or cause must be accidental. Death result-
[7] ing from voluntary physical exertion or from intentional acts of the insured is not accidental, nor is disease or death caused by the vicissitudes of climate or atmosphere the result of an accident; but where, in the act which precedes an injury, something unforeseen or unusual occurs which produces the injury, the injury results through accident."

In *Sinclair v. Maritime Passengers' Assur. Co.*, 3 El. & El. 478, 121 Eng. Reprint, 521, the court says: "We cannot think that disease produced by the action of a known cause can be considered as accidental. Thus disease or death, engendered by exposure to heat, cold, damp, the vicissitudes of climatic or atmospheric influences, cannot, we think, properly be said to be accidental unless brought about by circumstances which may give it the character of accident."

Respondent cites a number of cases in support of the contention that the circumstances in this case supply this element. But in each of these cases there is shown the element of accident. For example, in *Travelers' Assn. v. Insurance Co.*, 10

Manitoba, 537, the death of the insured by freezing was found to have been caused by prolonged exposure *due to the breaking down of the conveyance in which he was riding.*

In *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945, 22 L. R. A. 620, 7 C. C. A. 581, it was held that a drowning, caused by a temporary trouble to which the insured was not subject, but which was entirely unusual and uncommon, whereby he fell into the water, was "accidental."

In *United States Mut. Acc. Assn. v. Hubbell*, 56 Ohio St. 516, 40 L. R. A. 453, 47 N. E. 544, drowning while crossing a ford, which insured had safely crossed on previous occasions, and which was entered only with the apprehension of getting wet, was held to be "accidental."

It will be noted, however, that in each of the cases the [8] "accidental means" which brought about the death was shown. Here the only evidence is that the insured left camp in a heavy snowstorm, following the trail of an elk; he had been reared in the mountains; the weather was not cold enough to freeze a man, and the storm did not increase in violence. The body was found but two miles from camp, though insured would have had to walk five miles in order to reach the spot, a distance which could not have exhausted a strong young man; there was no place from which insured could have fallen to his death. The rifle he carried on leaving camp was not with the remains, and the automatic was still in his pocket. At the time the body was found it could not, of course, be ascertained whether there had been any marks on it. While there is no presumption that a man found dead has been murdered or has committed suicide, as was stated in *Laessig v. Travelers' Prot. Assn., supra*, it is equally true that no presumption can be indulged in that insured met death by external, violent and accidental means.

The insured, having contracted that the company should be liable only in case of death from injuries caused solely by external, violent and accidental means, the burden of proving that the case is within the terms of the policy rested upon

plaintiff, and this burden, in our opinion, was not sustained. Conjectural causes of death, which do not fall within the terms of the policy, as that insured died of heart failure or apoplexy, are as reasonable, under the evidence adduced, as those which fall within those terms.

While we are mindful of the rule that this court will not [9] disturb the findings of the trial court where there is substantial evidence to support them, in this case there is no evidence to support the finding "that Ora Tuttle came to his death by external, violent and accidental means on or about the twenty-second day of November, 1910."

The judgment of the district court of Jefferson county is therefore reversed, and the cause remanded to the trial court, with the direction to enter judgment in favor of the defendant.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE EX REL. DOLIN, APPELLANT, v. MAJOR, COUNTY CLERK, RESPONDENT.

(No. 4,609.)

(Submitted May 28, 1920. Decided June 25, 1920.)

[192 Pac. 618.]

Counties—Claims—County Auditor—County Commissioners—Powers—Statutes.

Claims Against Counties—Statutes—"Accounts"—Definition.

1. *Held*, that the word "accounts" in section 2894, authorizing the board of county commissioners to examine, settle and allow "all accounts legally chargeable against the county," must be understood in a broad, generic sense and as including any right to or claim for money due from and payable by the county, and not as limited to claims in the form of accounts only.

Same—Approval by Auditor Necessary.

2. Before claims against a county having an auditor (other than claims for salaries or the amounts of which are fixed by law), whether liquidated or not or incurred for material purchased by the commissioners under contract, can be allowed by the board, they must have the approval of the auditor, otherwise the board is without authority to order them paid.

Same—Disapproval by Auditor—Duty of County Clerk.

3. Where the board of commissioners allows and orders paid a claim against the county which has not indorsed upon it the approval of the auditor, it is the duty of the county clerk to refuse to draw a warrant in payment of it.

Same—Approval by Auditor not Binding Upon Board of Commissioners.

4. The approval of a claim against a county by its auditor is not binding upon the board of commissioners, it being clothed with discretion to determine whether it is or is not a proper charge against the county.

Same—Disapproval by Auditor—Effect.

5. Upon presentation to it of a claim which has been disapproved by the county auditor, the board of commissioners must pass upon it and make an order of disallowance, so that the claimant may appeal to the district court or bring his action against the county, neither of which remedies would be available to him without such action by the board.

Same—Disapproval by Auditor—Powers of District Judge—Constitution.

6. *Seemle*: It would seem that the proviso in section 3106, Revised Codes, empowering district judges to order payment of a claim against a county after disapproval by the auditor, is repugnant to section 1 of Article IV of the Constitution in that it undertakes to cast upon district judges a power which pertains exclusively to the executive branch of the government.

Same—County Auditor—Powers.

7. *Held*, that in view of the power granted a county auditor with respect to passing upon claims against the county, which is as much *quasi-judicial* and as extensive as that of the board of commissioners in examining them, the contention that his duty is limited to ascertaining whether claims are in proper form and that the amounts are correct, and that therefore the board is not bound by his disapproval of a claim but may allow and order it paid, is without merit.

Appeal from District Court of Sheridan County; C. E. Comer, Judge.

Mandamus by the state on the relation of Jos. F. Dolin to compel A. A. Major, Clerk of Sheridan County, to issue a warrant in payment of a claim against said county. From a judgment in favor of defendant, relator appeals. Affirmed.

Messrs. Babcock & Ellery, for Appellant, submitted a brief; *Mr. Paul Babcock* argued the cause orally.

The construction of section 3106, Revised Codes, seems primarily to turn on the meaning with which the word "audit" is used in the first sentence of the statute. The word "audit" is frequently restricted to a mere mathematical process to determine whether items of an account are correctly computed and to checking over vouchers attached to an account and determining whether they check out with the various items of the account. In *Travelers' Ins. Co. v. Pierce Engine Co.*, 141 Wis. 103, 123 N. W. 643, it was held: "The word 'audit' is sometimes restricted to a mere mathematical process but is generally extended to include investigation, weighing of evidence and deciding whether certain items should or should not be included." It may be conceded that the term "audit" ordinarily implies a hearing, and upon such hearing, a determination or allowance or rejection or other decision according to the nature of the claim. (*Cooke v. Board of Commrs. of Custer County*, 13 Okl. 11, 73 Pac. 270.) The term "audit" does not in any sense necessarily carry with it such an extended meaning, but the scope, purpose, intent and wording of the statute will determine whether the term is used in its restricted or extended meaning. (*T. M. Sinclair & Co. v. National Surety Co.*, 132 Iowa, 549, 107 N. W. 184.) In *Machias River Co. v. Pope*, 35 Me. 19, it was held: "To audit is to examine an account, compare it with vouchers, adjust the same and to state the balance by persons legally authorized for that purpose." (*Ford v. Springer Land Co.*, 8 N. M. 37, 41 Pac. 541; *In re Heath's Estate*, 52 N. J. Eq. 807, 33 Atl. 46.) Having in mind the distinction in the meaning of the term "audit" when used in the restricted sense and when used in the extended sense, an examination of section 3106, leads to the conclusion that the legislature used the term in a restricted sense only.

Section 2894, Revised Codes, as amended by Chapter 15, Session Laws of 1919, specifically gives to the county commis-

sioners the extended and final auditing power that the respondent necessarily contends lies in the auditor. The county commissioners are given the power to "examine, settle and allow." When these powers are compared to the powers given to the auditor, the difference clearly appears. The auditor may verify the claim by the vouchers. He may determine the mathematical accuracy of a claim. He may investigate and examine. He may inspect. He may note his approval. But he cannot settle, he cannot allow, he cannot reject and he cannot adjust.

There appears nowhere in the Act creating the office of county auditor any intent on the part of the legislature to take away from the board of county commissioners the power to finally determine, settle, allow either in whole or in part, claims filed against the county, and order their payment. In fact, the very provisions of the Act creating the office of county auditor emphasize the fact that this final auditing power is in the board of county commissioners and not in the auditor. The power to settle and allow a claim against the county is certainly not given to the county auditor nor is it given to the district judge. The power must necessarily be in the board of county commissioners where it is placed by statute and no other officer or tribunal can exercise that power save the board of county commissioners.

Oregon has a statutory provision substantially similar to section 2106, as far as the question in issue in this action is concerned. The supreme court of that state in *Bridges v. Multnomah County*, 92 Or. 214, 180 Pac. 505, in construing this provision, and, referring particularly to the power of the board of county commissioners to approve and order payment of a claim which the auditor had disapproved, held: "It is true that the board of county commissioners can reject a claim which the auditor has approved or, on the other hand, the board can approve and order the payment of a claim which the auditor has rejected; and yet notwithstanding the fact that the ultimate authority to pay or to refuse to pay is lodged in

the board of county commissioners, the demand must first be presented to the auditor before it is ripe for the consideration of the board."

Mr. J. J. Gunther and *Mr. Geo. Cudhie*, for Respondent, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

It is clear, then, that it was the intention of the legislature to require all claims against a county, having a county auditor, to be approved by both the board of county commissioners and by the auditor before payment thereof can be made. The fact that the statute requires both approval and disapproval to be indorsed upon the claim, and that only in case of disapproval by the auditor can the judge of the district court order a claim to be paid, leads unerringly to the conclusion that it was the legislative intent that in no case should the county commissioners have the power to override the action of the county auditor in disapproving a claim, and that this authority should be exercised only by the judge. Should the county auditor approve the claim, then the concurrence of the county commissioners in the approval entitles the claimant to receive a warrant for the amount; and the only person who can complain in this event is a taxpayer, or other person whose interests are affected. Should the county auditor approve and the commissioners disapprove a claim, then the remedy is by appeal under the provisions of section 2947, Revised Codes, or perhaps by direct action against the county for the amount claimed. Where, however, the claim is disapproved by the county auditor, the board of commissioners is eliminated and the judge of the district court is the only person authorized to override the action of the auditor, and order the claim paid. Thus the functions of the auditor and of the board of county commissioners are combined in the judge, who has authority to audit the claim (the function of the auditor) and to order it paid (the function of the commissioners). If the commissioners have authority to overrule the auditor in disapproving a claim, then the auditor might become a useless

official; and the proviso authorizing the judge to act will become nugatory. The report of the auditor of the result of his investigation and examination of the claim and of which he is obliged to make a record (sec. 3106) is available to the judge, to enable him to pass upon the claim.

Appellant in his brief says: "Under the provisions of sentence 4 of section 3106, construed literally, the district judge might order a claim paid which has been disallowed by the county commissioners." Appellant is in error in this assumption. The only authority given the district judge is to order payment of a claim which has been disapproved by the county auditor. With a claim disallowed by the county commissioners he has nothing to do. The remedy in such case is by appeal or by direct action. (See *Board of County Commrs. v. Cypert* (Okl.), 166 Pac. 195-197. See, also, *Torres v. Board of Commrs.*, 23 N. M. 700, 171 Pac. 510; *Albers v. Barnett*, 53 Mont. 71, 161 Pac. 521-524; Rev. Codes, sec. 6450A.)

It appears that in creating the office of county auditor the legislature intended to vest in the officer executive powers, rather than mere clerical or ministerial duties. The whole chapter read together leads irresistibly to the conclusion that it was the legislative intent that the auditor should exercise executive and administrative authority. With these extensive powers conferred upon him, as well as the duty imposed upon him to investigate and examine, approve or disapprove, all claims against the county, the powers given exceed, perhaps, those of any other county officer; and that these powers were given deliberately and with the intention of creating an office with authority to act as a check upon the commissioners in matters pertaining to the payment of claims against the county is apparent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On November 29, 1919, the relator (plaintiff) presented to B. K. O'Grady, the auditor of Sheridan county, for her ap-

proval, a claim for printing done by relator for the county, properly itemized and verified as provided by the statute. (Rev. Codes, sec. 2945.) On December 2, the auditor approved the claim in part but disapproved it as to the remainder, and reported it to the board of county commissioners with the indorsement of her action thereon. At its regular session on January 6, 1920, after considering the claim, the board disregarded the action of the auditor disapproving a portion of it, settled and allowed it in full, and ordered the defendant (respondent), the county clerk, to draw a warrant for the amount of it in favor of the relator. The defendant refused to comply with the order, though the relator made demand upon him. Thereupon the relator applied to the district court for a writ of *mandamus* to compel him to issue the warrant. In response to the alternative writ, he filed his answer in which he denied the power of the court to order him to issue the warrant. Relator's general demurrer to the answer having been overruled, he elected to submit the application for final decision upon a question of law raised by the answer. The court rendered judgment for the defendant setting aside the alternative writ and dismissing the application. The relator has appealed. The question presented for decision is whether the board of commissioners may settle and allow a claim against the county and order the issuance of a warrant for its payment, though it has been disapproved by the county auditor. In other words, Is it within the authority of the board of commissioners under the statute defining its power and jurisdiction in that behalf to settle and allow a claim against the county, notwithstanding the auditor has disapproved it?

A claim, as the one in question here, may be disapproved only in part. The part disapproved, however, is still *pro tanto* a claim outstanding against the county, the validity of which remains to be determined at the option of the claimant by such proceeding as may be available to him for that purpose; for, however extensive the power possessed by the audi-

tor, it cannot be assumed that his disapproval of a claim is finally conclusive against the claimant.

The general powers of the board of county commissioners with reference to claims against the county are defined in section 2894 of the Revised Codes, as follows: "The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law, * * * at regular meetings of the board to examine, settle and allow all accounts legally chargeable against the county, except salaries of officers, and order warrants to be drawn on the county treasurer therefor, and provide for the issuing of the same." The duties of the county clerk in this respect are defined, as follows: "The county clerk must: * * * Draw warrants on the county treasurer in favor of all persons entitled thereto in payment of all claims and demands chargeable against the county, which have been legally examined, allowed and ordered paid by the board of county commissioners; also for all debts and demands against the county when the amounts are fixed by law, which are not directed to be audited by some person or tribunal." (Sec. 3045.)

Sections 3100 to 3110, inclusive, create the office of county auditor, for all counties having an assessment of not less than \$8,000,000 and prescribe the duties of this officer. Section 3106 declares: "It shall be the duty of persons holding claims against any county having a county auditor to present the same to the county auditor, whose duty it shall be to audit the same. The county treasurer shall also investigate and examine into all claims presented to him and report the same with his findings to the board of county commissioners at their [its] regular session after such investigation shall have been completed with his approval or disapproval endorsed thereon and he shall keep a complete record of all such claims and of his investigations and examinations of the same in a book kept for that purpose. In all counties having a county auditor, all bills, claims, accounts or charges for materials of any kind or nature that may be purchased by and on behalf of the

county by any of the county officers or contracted for by the county commissioners, shall be investigated, examined and inspected by the county auditor who shall endorse his approval or disapproval thereon before any warrant for the payment of the same can be drawn. In all counties having a county auditor, no claim against the county shall be paid or warrant drawn therefor unless the same shall have the approval of the county auditor; provided, however, that the judge of the District Court of the county where any claim has been disapproved by the county auditor may order the payment of the same."

It will be noticed that under section 2894 the power of the [1, 2] board to settle and allow claims against the county seems to be limited to those in the form of accounts only; but, speaking generally, since the board has the exclusive power to act for the county and to control the disbursement of its funds, the word "accounts" used therein must be understood in a broad, generic sense, and as including any right to or claim for money which is due and payable from the county treasury; for whether a claim, other than one of those expressly excepted, be technically in the form of an account or not, the board must recognize it as a legal claim before it can make an allowance of the amount of it and order its payment. Otherwise, the clerk may not draw a warrant on the treasurer in any case not directly authorized by section 3045. As to the excepted claims, namely, salaries and debts and demands, the amounts of which are fixed by law, no allowance is necessary, because jurisdiction over them is not vested in the board, and it is the clerk's legal duty to draw warrants for their respective amounts. That the word "accounts" is employed in this sense is apparent from the terms used in defining and limiting the clerk's authority in the latter section. This conclusion is made necessary, too, by section 3106, in that it requires all claims to be presented to the county auditor, and that this officer shall "investigate and examine into all claims presented

to him" and report them to the board at its regular meeting thereafter "with his approval or disapproval endorsed thereon." In terms the first two sentences of the latter section require action by the auditor before a claim may be presented to the board at all. Therefore, this section is one of the limitations or restrictions upon the general power and jurisdiction of the board mentioned in section 2894. To put this beyond contro-
[3] versy, the last sentence in the section expressly prohibits the drawing of any warrant in payment of any claim unless it "shall have been approved by the county auditor." This prohibition, of course, does not include salaries of officers or demands, the amounts of which are fixed by law. For these the clerk is directed to draw warrants without an order or allowance by the board. It does include, however, all other claims against the county, whether they may be classified as liquidated or unliquidated claims. As to a claim of this character the approval of the auditor is made a condition precedent to its allowance by the board or the drawing of a warrant in payment of it by the clerk. Unless this condition is complied with, the board is without power to act upon it at all, and if it presumes to allow it and to order it paid, the clerk has no authority to draw a warrant for the amount of it. On the contrary, it is his duty to refuse to obey the order, for he is required to obey the order of the board only when a claim has been "legally examined, allowed and ordered paid" by it. When it does bear indorsement by the auditor of his disapproval, the clerk is thus notified that he is forbidden by section 3106 to draw the warrant. In view of the language employed in the first two sentences of this section, it seems that specific reference in the third sentence to charges for material purchased by or on behalf of the county by any county officer or contracted for by the county commissioners is wholly unnecessary; for taking these together, as we have said above, they make it clear that the legislature intended that all claims shall be presented and be approved or disapproved by the auditor before they are subject to the juris-

diction of the board for any purpose. These two sentences clearly evince this intention, but the prohibition, contained in the last sentence removes all doubt in this regard. Doubtless, by specific reference to this class of claims the legislature intended to put them by express terms in the same category as other claims and thus to leave no ground for the holder of such a claim, or for the board itself, to believe that it is not subject to investigation and approval or disapproval by the auditor, because it has been contracted by the board or any county officer. It is obvious, also, we think, that by requiring the auditor to report the claims to the board with his approval or disapproval, the intention was to leave the board free to exercise its judgment and discretion in allowing and ordering paid the approved claims; for no restriction is declared as to the power of the board in this respect. It is obvious, too, we think that the only power left to the board with reference to claims disapproved is to disallow them. That it is incumbent upon it to do so is made apparent by these considerations.

As to claims approved by the auditor the board may allow [4] or disallow them at its discretion. It is entirely within its province to finally determine whether any claim, though approved by the auditor, is a proper charge against the county, for there is nothing in section 3106 suggestive of the idea that the approval by the auditor has the effect of an allowance or that it is binding upon the board. The board is left free to exercise its judgment under section 2894. It is bound, however, by the disapproval of the auditor, for "no claim * * * shall be paid or warrant drawn therefor unless the same shall have the approval of the county auditor." It is, nevertheless, not excused from passing upon a claim which has been disapproved by the auditor, for the requirement that he shall report such a claim to the board with his disapproval indorsed thereon must have some purpose. Otherwise, his report of a claim disapproved by him would be an idle act. It is a fair inference that the board shall make an order disallowing it so that the claimant may, at his option,

proceed to enforce it against the county by means of an appeal to the district court (Rev. Codes, sec. 2947), or by bringing his action directly against the county. (Rev. Codes, sec. 6450a; *Greeley v. Cascade County*, 22 Mont. 580, 57 Pac. 274.) Neither one of these remedies would be available to him without a presentation to and an order of disallowance by the board (Rev. Codes, secs. 2945, 2947; *First Nat. Bank v. Commissioners of Custer County*, 7 Mont. 464, 17 Pac. 551; *Powder River Cattle Co. v. Commissioners of Custer County*, 9 Mont. 145, 22 Pac. 383), and it may not be presumed that the legislature intended by the creation of the office of auditor to restrict in any way the right of the claimant to avail himself of these remedies to enforce his claim, or to repeal or modify them in any respect.

It is true that the proviso in the last sentence gives the [6] judge of the district court of the county the power to order the payment of a claim which has been disapproved by the auditor. Conceding, for the moment, that the legislature could lawfully impose upon the district judge the duty to consider in a summary way any claim against the county, the expression, "may order the same paid," employed in the proviso, cannot mean more than that the judge may revise and overrule the action of the auditor and approve the claim; for it cannot be supposed that the legislature intended to constitute the judge the final arbiter between the county and the claimant, and thus take away from the county the right to have the validity of any claim against it judicially determined in the ordinary way. The county, as well as the claimant, has a right to its day in court and to have a controversy over a disputed claim tried by a jury. This right the legislature cannot take away. Besides this, we are inclined to the opinion that the proviso is open to the objection that by it the legislature undertook to cast upon the judge the duty to exercise a power which pertains exclusively to the executive branch of the government and thus that it is repugnant to section 1 of Article IV of the Constitution. These remarks are merely

suggestive, however. It is not our purpose to express other than a tentative opinion as to the validity of the proviso, for no question in this behalf arises in this case.

Counsel contend that the word "audit" is used in this section in its narrow and restricted sense and that, when we so consider it, together with the language employed in section [7] 2894, it is apparent that the office of auditor was created solely for the purpose of relieving the board from the duty of inspecting accounts and determining whether they are in proper form and the amounts of them are mathematically correct. They insist that since this is so, the board may overrule the decision of the auditor in disapproving a claim, allow it and order it paid. This position cannot be maintained. It is apparent from section 3104, taken together with the requirement in section 3106, that the auditor must investigate and examine all claims, that his power is *quasi-judicial* in character, just as is that of the board when it proceeds to examine and allow or disallow the claims reported to it. He is authorized by section 3104 to compel the attendance of witnesses, to administer oaths, and to examine into any matter which he deems necessary. This power is wholly inconsistent with the idea that he is limited to the mere duty of ascertaining whether the claim is in proper form and that the amount of it is correct. It is obvious, too, that the legislature, in vesting the auditor with this character of power, created the office in order to relieve the boards of commissioners in counties having an assessment of \$8,000,000 or over, of a part of their duties, namely, that of investigation necessary to ascertain the propriety and validity of the numerous claims which are necessarily presented from time to time. It proceeded upon the theory that in the more wealthy and prosperous counties the amount of business coming before the boards would be larger in volume, and that they would have less time to devote to the examination and investigation of these claims. It had the power to do this if it chose, as well as to omit to provide for such assistance to boards in the less wealthy and populous

counties in which the demands upon their attention would necessarily be not so great.

The judgment is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

NELSON, APPELLANT, v. MUTUAL LIFE INSURANCE CO.,
RESPONDENT.

(No. 4,159.)

(Submitted June 1, 1920. Decided June 25, 1920.)

[190 Pac. 927.]

*Life Insurance—Nature of Contract—Forfeiture—Waiver—
Burden of Proof.*

Life Insurance—Time Essence of Contract—Forfeiture.

1. Time is of the essence of all insurance contracts, and failure to pay the premium when due, or of any installment thereof, works a forfeiture, unless by a course of dealing with the insured the insurer has evinced an intention to waive strict compliance.

[As to conclusiveness of acknowledgment of receipt of premium in life insurance policy, see note in *Ann. Cas.* 1915D, 366.]

Same—Forfeiture—Waiver—Burden of Proof.

2. Where plaintiff in an action on a life insurance pleaded reinstatement after forfeiture resultant from nonpayment of an installment of the premium, asserting that the insurer waived the provision of the contract which required the insured to furnish a certificate of good health satisfactory to the company as a condition precedent to reinstatement, she had the burden of establishing the waiver of forfeiture.

Same—Retention of Payment of Arrearage—When not Waiver.

3. Where, two months after an insurance policy had lapsed, insured sent a check covering the arrearage, without, however, including interest thereon as provided in the contract, the company retaining the check and advising him that it would be held in suspense until he had furnished a satisfactory certificate of health, the retention of the check alone did not constitute a waiver of forfeiture or result in reinstatement.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

ACTION by Lura A. Nelson against the Mutual Life Insurance Company of New York. From a judgment for defendant and order denying new trial, plaintiff appeals. Affirmed.

Mr. F. B. Reynolds, Mr. Jas. L. Davis and Mr. Clyde Mc-Lemore, for Appellant, submitted a brief and one in reply to that of Respondent; *Mr. Reynolds* argued the cause orally.

The default upon the part of the insured in failing to pay premium upon August 10, or within thirty days thereafter, was waived by the company: (a) By its acceptance of the payment thereof upon October 8. (25 Cyc. 870; 14 R. C. L., "Insurance," 367; *Shea v. Massachusetts Ben. Assn.*, 160 Mass. 289, 39 Am. St. Rep. 475, 35 N. E. 855; *Rice v. New England Mut. Aid Society*, 146 Mass. 248, 15 N. E. 624; *Williams v. Maine State Rel. Assn.*, 89 Me. 158, 36 Atl. 63; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862; *Murray v. Home Ben. Life Assn.*, 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; *Massachusetts Ben. Life Assn. v. Robinson*, 104 Ga. 256, 42 L. R. A. 261, 30 S. E. 918; *Loftis v. Pacific Mutual L. Ins. Co.*, 38 Utah, 532, 114 Pac. 134; *Occidental Life Ins. Co. v. Jacobson*, 15 Ariz. 242, 137 Pac. 869.) (b) By its demand of payment of the next quarterly premium, which became due November 10. (*Murray v. Home Ben. Life Assn.*, 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; *Williams v. Empire Mut. Ann. & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Stylow v. Wisconsin Odd Fellows' M. Life Ins. Co.*, 69 Wis. 224, 2 Am. St. Rep. 738, 34 N. W. 151; *Denver Life Ins. Co. v. Crane*, 19 Colo. App. 191, 73 Pac. 875; *Beatty v. Mutual Reserve Fund Life Assn.*, 75 Fed. 65, 21 C. C. A. 227.) (c) By cashing the insured's checks, and retaining the money from October 8 or 9, without even offering to return it until after the death of the insured in December, and the tender back made after insured's death was not kept good by bringing the money into court. This the company could not do and at the same time insist upon a forfeiture of the policy under which the money had been paid to it by the insured. (*Andrus v.*

Fidelity Mut. Life Ins. Assn., 168 Mo. 151, 67 S. W. 582; *Life Ins. Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862; *Jaggi v. Prudential Ins. Co.*, 191 Mo. App. 384, 177 S. W. 1064; *Rasmusen v. New York Life Ins. Co.*, 91 Wis. 81, 64 N. W. 301; *Modern Woodmen of America v. Jones*, 52 Ind. App. 149, 98 N. E. 1006; *Coile v. Order of United Commercial Travelers' etc.*, 161 N. C. 104, 76 S. E. 622; *Bingler v. Mutual Ben. Life Ins. Co.*, 10 Kan. App. 6, 61 Pac. 673.)

The waiver, once made, was irrevocable. (*Denver Life Ins. Co. v. Crane, supra*; *Life Ins. Clearing Co. v. Altschuler, supra*; *Mettner v. Northwestern Nat. Life Ins. Co.*, 127 Iowa, 205, 103 N. W. 112; *Keys v. National Council K. & L. of S.*, 174 Mo. App. 671, 161 S. W. 345; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *Baltimore Life Ins. Co. v. Howard*, 95 Md. 244, 52 Atl. 397; *Burgess v. Mercantile Town Mut. Ins. Co.*, 114 Mo. App. 169, 89 S. W. 568.) If the forfeiture had been waived, obviously the company had no right, in its letter of October 14, to demand a certificate of health. (*True v. Bankers' Life Assn.*, 78 Wis. 287, 47 N. W. 520; *Aetna Life Ins. Co. v. Sanford*, 200 Ill. 126, 65 N. E. 661; *New England Mut. Life Ins. Co. v. Springgate*, 129 Ky. 627, 19 L. R. A. (n. s.) 227, 112 S. W. 681, 113 S. W. 824.) In its letter of December 8, the company unequivocally granted to the insured an extension of time to December 25, for the furnishing of such certificate as well as for the payment of the premium due November 10. Such extension, being unrevoked, was valid, and had the effect of continuing the policy in force up to the date of the death of the insured, which took place within the period of extension, on December 13. (*Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 Pac. 740; *Aetna Life Ins. Co. v. Sanford*, 200 Ill. 126, 65 N. E. 661; *Noem v. Equitable Life Ins. Co.*, 37 S. D. 176, 157 N. W. 308; *Michigan Mut. Life Ins. Co. v. Custer*, 128 Ind. 25, 27 N. E. 124; *Mutual Reserve Life Ins. Co. v. Heidel*, 161 Fed. 535, 88 C. C. A. 477; *Carr v. Prudential Ins. Co.*, 115 App. Div. 755, 101 N. Y.

Supp. 158; *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 42 L. R. A. 147, 49 N. E. 876; *Rouleau v. Continental Life Ins. etc. Co.*, 45 Utah, 234, 144 Pac. 1096; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689 [see, also, Rose's U. S. Notes]; *Homer v. Guardian Mut. Life Ins. Co.*, 67 N. Y. 478.)

Mr. Charles R. Leonard, Mr. O. F. Goddard and Mr. Earle N. Genzberger, for Respondent, submitted a brief; *Mr. Leonard* argued the cause orally.

There was no waiver. The position of the company is fully defined in its letters. There was no unconditional acceptance of the money on October 8, or any other time, nor is there any evidence in the correspondence or conduct of respondent to show that there was any intention to waive the default. There was no demand in the letter of December 8 for payment of the subsequent premium which fell due November 10. This letter merely mentioned the matters which were necessary for reinstatement and was not the formal notice or demand for payment of premium. The conclusion cannot be escaped that the policy had actually lapsed and become void by reason of the failure to pay the premium when due on August 10, or within thirty days thereafter. Under the undisputed terms of the policy two things were required for its reinstatement: First, the payment of the premium with interest, and, second, the furnishing of satisfactory proof of insurability; and the evidence does not show any action whatever or any intention on the part of the company to waive either of these requirements. Under the terms of the policy that the contract "shall immediately cease and become void," it had expired and it could only be restored upon the terms above mentioned. The policy lapsed through default on the part of the insured to observe its plain terms.

Counsel in his brief has made extensive reference to decisions of courts of other states, but none to Montana supreme court decisions, although they have a direct bearing upon the

case at bar, and, in fact, are decisive upon every point involved. (See *Kennedy v. The Grand Fraternity*, 36 Mont. 325, 25 L. R. A. (n. s) 78, 92 Pac. 971; *Sullivan v. Germania Life Ins. Co.*, 15 Mont. 522, 39 Pac. 742; *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092.)

The retention of a premium after application for reinstatement pending investigation of the truth of the certificate that insured was in good health does not constitute a reinstatement or a waiver, nor does it put the policy in force. (*Fraser v. Aetna Life Ins. Co.*, 114 Wis. 510, 90 N. W. 476; 14 R. C. L. 989; 19 Am. & Eng. Ency. of Law, 58.) The acceptance or retention of premiums after forfeiture may be on the condition that the insured is then in good health, or that a medical certificate of good health be furnished, in which case there is no waiver unless insured is in good health and he furnishes the certificate. (25 Cyclopedic of Law Procedure, p. 871; *New York Life Ins. Co. v. Scott*, 23 Tex. Civ. 541, 57 S. W. 677; *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, Ann. Cas. 1914D, 1029, 57 L. Ed. 879, 33 Sup. Ct. Rep. 523 [see, also, Rose's U. S. Notes]; *Fraser v. Aetna Life Ins. Co.*, 114 Wis. 510, 90 N. W. 476; *Crook v. New York Life Ins. Co.*, 112 Md. 268, 75 Atl. 388; *Mutual Reserve Fund Life Assn. v. Lovenberg*, 24 Tex. Civ. 355, 59 S. W. 314; *New York Life Ins. Co. v. Scott*, 23 Tex. Civ. App. 541, 57 S. W. 677; *Clifton v. Mutual Life Ins. Co.*, 168 N. C. 499, 84 S. E. 817.) We cite also the case of *Nielsen v. Provident Sav. Life Assur. Soc.*, 6 Cal. Unrep. 804, 66 Pac. 663, which we contend is a parallel case and sustains our contention. The opinion was written by the commissioners, and while their finding in the case is not sustained in the later opinion by the court in 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168, the reversal was on another point and the reasoning of the first opinion as to waiver is in no way impaired.

In all the cases cited by appellant there is some condition or set of conditions which clearly differentiates the cases from

the case at bar. Such, for instance, are some of the cases where the company has sent an unconditional demand or request for payment of a premium after default was made, plainly indicating that the policy was still in force. In other cases the insured has simply been notified that the premium is overdue or is still unpaid, without any statement that the policy has lapsed or is void. Such, for instance, is the case of *Noem v. Equitable Life Ins. Co.*, 37 S. D. 176, 157 N. W. 308. We are confident this court will conclude that they do not sustain the position taken by appellant. Nor do they gainsay the position established by this court that the policy, having lapsed through failure to make payment of the premium, can only be reinstated in the manner specified in the policy.

MR. JUSTICE COOPER delivered the opinion of the court.

Action to recover upon a policy of life insurance in the sum of \$2,000. The cause was tried by the court without a jury and resulted in a judgment for the defendant. Plaintiff appeals from the judgment and from an order denying her a new trial.

The provisions of the policy pertinent to this inquiry are as follows:

“Premiums. All premiums are payable in advance at said home office or to any agent of the company upon delivery, on or before date due, of a receipt signed by either the president, vice president, second vice president, secretary or treasurer of the company and countersigned by said agent.

“A grace of 30 days (or one month, if greater), subject to an interest charge at the rate of 5 per centum per annum, shall be granted for the payment of every premium after the first, during which time the insurance shall continue in force. If death occur within the period of grace, the overdue premium and the unpaid portion of the premium for the then current policy year, if any, shall be deducted from the amount payable hereunder.

"Except as herein provided, the payment of a premium or installment thereof shall not maintain this policy in force beyond the date when the next premium or installment thereof is payable. If any premium or installment thereof be not paid before the end of the period of grace, then this policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the company, except as hereinafter provided. * * *

"*Reinstatement.* Unless it shall have been surrendered for its cash value, this policy may be reinstated at any time within three years from date of default in payment of any premium, upon evidence of insurability satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of 5 per centum per annum. * * *

"Agents are not authorized to modify this policy or to extend the time for paying the premium."

By mutual agreement, the policy was changed to permit the annual premiums to be paid in quarterly installments of \$16.49 on February 10, May 10, August 10, and November 10, of each year.

The determinative issue in the case is presented by the sixth paragraph in the complaint, as follows: "That said Merl S. Nelson fulfilled all the conditions of said policy on his part to be performed, and paid all premiums provided for in said policy up to the date of his death, in accordance with said policy and agreement for quarterly payments, as above mentioned, except the installment of premium which was due August 10, 1915, was paid October 13, 1915, and the installment due November 10, 1915, was never paid." All the allegations of the complaint are denied by the answer. The premium payments were all met to the satisfaction of the company, until August 10, 1915, the policy being in full force on that date, at which time, however, a quarterly payment of \$16.49 on the annual premium fell due. On October 8 insured's check for that amount was received by the company and

placed in its suspense account. The insured died on December 13, 1915.

Appellant's position is that the forfeiture was waived:

"1. (a) By the acceptance of the payment of premium on October 8; (b) by demand of payment of the next quarterly premium, which became due November 10; and (c) by the retention of the money from receipt thereof on October 8, without even offering to return the same until after the death of the insured.

"2. Having waived the forfeiture, the company had no right to require a certificate of health.

"3. The time for the payment of the premium which became due November 10 was extended to December 25, by reason whereof the policy was in full force and effect at the death of the insured."

If the retention of the proceeds of the check is to be construed as a waiver of the health certificate the policy requires, or, what amounts to the same thing, "evidence of insurability satisfactory to the company," the conclusion would logically follow. Did the company forego this important right?

On September 9, 1915, the following letter was mailed to the insured by the agent of the company in the city of Spokane, Washington, and received in due course:

"Mr. M. S. Nelson,

"Billings,

"Dear Sir: I regret to note that you have allowed your policy to lapse by default in the payment of the last premium. This may have been an oversight, or there may be something about your contract which you do not fully understand. In either event, I trust you will favor us with your reason for discontinuing. Frequently a policy that does not exactly meet the requirements of a policy holder may be changed to some other plan, or, if necessary, reduced in amount. If it is inconvenient for you to pay the premium at this time, it is possible we can assist you with a loan, if the contract has been in force three years; or the payments may be changed to semi-

annual or quarterly. At any rate we would like to hear from you on the subject. A life insurance policy is too valuable an asset to your estate to be cast aside if it can possibly be avoided, and it should be borne in mind that to drop a policy or change it for a contract in another company is always to the detriment and cost of the insured. Being a mutual company our interests are the same, and we are always pleased to answer any questions or make explanations which may be of service to our members. Trusting that you will take up the matter of restoring the policy, and that we may hear from you by return mail, I am, *etc.*,

“W. H. SHIELDS, Manager.”

The following indorsement appears on the bottom of the letter last referred to, in the handwriting of Merl S. Nelson: “Inclosed find check. Merl S. Nelson, 203 S. 30th St., Billings, Mont.” This, the father of the insured testified, was found shortly after his death, in a tin box containing his private papers, together with a canceled check dated September 5, 1915, in the sum of \$16.49, showing its indorsement and deposit by defendant and return in due course to the insured.

From the testimony of Miss Mary I. Williams, it appears that on October 14, 1915, after the receipt and deposit of the check, the following letter was sent to the insured:

“Dear Sir: We beg to acknowledge receipt of check for \$16.49 tendered in payment of the premium due August 10 last under your policy No. 2043476, but as this remittance was not received within the 30 days of grace allowed by the company the policy has now lapsed, and in order to restore same it will be necessary for you to furnish the company with a satisfactory certificate of health. We are inclosing you herewith blank for this purpose, which, if you will kindly take to either of our examiners, Dr. James Chapple or Dr. E. W. Thuerer, of your city, he will be glad to complete same for you. The fee charged in this connection will be paid by the company. Trusting you will give this matter attention at

your earliest convenience, so that your policy may be restored, we are, *etc.*,

“W. H. SHIELDS, Manager.”

To this there was no reply.

On December 8, 1915, the following letter was sent from the office of the defendant in Spokane, Washington, in the regular routine of the business:

“Dear Sir: On October 14, last, we acknowledged receipt of your check for \$16.49 tendered in payment of premium due August 10, last, under your policy No. 2043476. Of course, this check could not be accepted, as your policy had already lapsed; it was therefore placed in suspense pending receipt of satisfactory certificate of health, but to date we do not appear to have received this certificate. Another quarterly premium of \$16.49 fell due November 10, last, and check for this amount must now accompany the certificate of health to this office. We would very much like to have you give this matter your attention at your earliest convenience, so that the same may be cleared up before the first of the year. If we do not hear from you on or before December 25, we will refund your check of \$16.49.”

In the case of *Kennedy v. The Grand Fraternity*, 36 Mont. 325, 25 L. R. A. (n. s.) 78, 92 Pac. 971, the constitution and by-laws of the defendant society provided: “That if the assured, denominated ‘frater,’ shall fail to pay his monthly dues on or before the last secular day of the month for which the same are due and payable, he shall ‘thereupon become suspended by his own act, and his benefit certificate or certificates shall be absolutely void.’” This provision is identical, in effect, with the forfeiture clause in the policy under consideration.

It seems to be well settled that time is of the essence of all [1] insurance contracts; and, even though the condition be construed as a condition subsequent, failure to pay when due forfeits the contract. (*New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789 [see, also, *Rose’s U. S. Notes*].)

When the annual premium is payable in installments, a failure to pay any installment works a forfeiture. (*Klein v. New York Life Ins. Co.*, 104 U. S. 88, 26 L. Ed. 662 [see, also, *Rose's U. S. Notes*].) This court so held in the *Kennedy Case*, where the rule is stated thus: "The mere failure * * * to pay his dues for April and May *ipso facto* worked a forfeiture of his membership and an abrogation of the contract between the parties." To the same effect is the case of *Nielsen v. Provident etc. Assur. Soc.*, 6 Cal. Unrep. 804, 66 Pac. 663. (See, also, 2 Bacon on Life and Accident Insurance, sec. 453; *Holly v. Metropolitan Ins. Co.*, 105 N. Y. 437, 11 N. E. 507.) The language of the policy in suit can mean nothing less. Punctuality in the payment of the premiums is a prerequisite in all contracts of life insurance. Indeed, no life insurance company could continue to do business without a strict adherence to the terms of its contracts. The unequivocal holding in the *Kennedy Case* is that a failure on the part of the insured to meet the payments within the time provided removes the liability of the insurer, unless, by a course of dealing with the insured, it has evinced an intention to waive evidence of continued insurability, as this language implies: "This policy may be reinstated at any time, within three years from date of default in payment of any premium upon evidence of insurability satisfactory to the company and upon payment of the arrears of premium with interest thereon at the rate of 5 per centum per annum." (19 Ency. of Law, 2d ed., 44, 47, and cases cited; *Butler v. Grand Lodge, A. O. U. W.*, 146 Cal. 172, 79 Pac. 861; 2 Bacon on Benefit Societies and Life Insurance, 3d ed., sec. 385.) The plaintiff in the *Kennedy Case*, as in the case at bar, pleaded reinstatement [2] of the insured, thereby assuming the burden of establishing a waiver of the forfeiture. The claim was there made that, because the application for reinstatement was accompanied by the necessary fees then in arrears, assured had met all the requirements of the constitution and by-laws of

the society, and neither the secretary nor its officers could refuse to recognize such reinstatement.

But, as we have seen, a contract of insurance can only be kept alive by payment of the premiums within the time specified. In case of default, as here shown, it was incumbent upon the insured to meet the provision of the policy requiring certificate of good health "satisfactory to the company," before it could be revived, unless production of the health certificate was waived by the company. Says Mr. Justice Holloway in the *Kennedy Case*: "This contract requires, in addition to the acts and things to be done on the part of the insured, that the society, or its officers, shall take affirmative action which involves the exercise of discretion and judgment; for the insured is only reinstated upon furnishing satisfactory evidence that he is in good health, and securing the approval of the Grand Secretary." To precisely the same effect are *New York Life Ins. Co. v. Scott*, 23 Tex. Civ. App. 541, 57 S. W. 677; *Clifton v. Mutual Life Ins. Co.*, 168 N. C. 499, 84 S. E. 817. *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092, is in harmony with these views.

By the express terms of the policy, the liability of the defendant was unalterably fixed. It could not escape payment of the principal sum to the beneficiary upon the death of the insured, had the premiums been paid according to the terms of the policy. By the same token, the beneficiary could not hope to enjoy its fruits without prompt payment of the premiums, or within the time fixed by the policy. These obligations were mutual. Upon default of any one of the payments specified the liability of the company ceased immediately, and the parties were not restored to their *status quo ante* until the insurability of Nelson had been proven to the satisfaction of the company, and the arrears of the premium *with interest at the rate of five per centum per annum paid*, as the language of the policy plainly indicates. The August 10 installment was nearly two months overdue, interest accru-

ing meanwhile. Of the interest due no tender was made. The check did not reach the office of the company until nearly sixty days after the payment was due. To work a restoration of the policy two things were necessary under its provisions: Proof of insurability satisfactory to the company, and a tender of the overdue premium and interest from the time of default. Assuming that by retaining the check the company waived the interest on the overdue premium, evidence that it did not waive production of the health certificate, as the policy required, is furnished in the three letters addressed to the insured, advising him that the policy had lapsed and that the health certificate was a condition precedent to the restoration of his rights in the premises. (*Thompson v. Fidelity Mutual Life Ins. Co.*, 116 Tenn. 557, 115 Am. St. Rep. 823, 6 L. R. A. (n. s.) 1039, 92 S. W. 1098; *Melvin v. Piedmont Ins. Co.*, 150 N. C. 398, 134 Am. St. Rep. 943, 64 S. E. 180.)

In *Clifton v. Mutual Life Ins. Co.*, 168 N. C. 499, 84 S. E. 817, the supreme court of North Carolina, dealing with a similar question, said: "We agree with his honor that there is no evidence of a waiver of the conditions of the policy. The defendant had a right to receive the premium and hold it, awaiting the return of the health certificate. That not being forthcoming, the defendant properly returned the premium after the death of the insured. Receiving the premium under such circumstances is no evidence of a waiver. * * *

In *Hay v. Insurance Co.*, 143 N. C. 257, 55 S. E. 623, the chief justice very pertinently says: 'It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has the right to take notice when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted.' "

The letter of September 9, addressed to Merl S. Nelson, informed him that he had then allowed his "policy to lapse by default in payment of the last premium," a fact of which he was presumed to have knowledge. By the letter of October 15, receipt of his check for \$16.49, tendered in payment of the premium due August 10, was acknowledged and he was again advised that his policy had lapsed and that in order to *restore* the same it would be necessary to furnish the company with a satisfactory certificate of health; and again, on December 8, by letter he was advised that his policy had already lapsed and the proceeds of his check placed in suspense pending receipt of certificate of health which he had not then furnished, and never did furnish, and that "if we do not hear from you on or before December 25, we will refund your check of \$16.49."

Our opinion is that the policy had lapsed, that the letters addressed to the insured clearly negatived a waiver of the forfeiture committed by the insured, and that the judgment and order refusing plaintiff a new trial should be and are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES
HOLLOWAY, HURLY and MATTHEWS concur.

STATE EX REL. DANSIE, APPELLANT, v. NOLAN,
RESPONDENT.

(No. 4,483.)

(Submitted June 1, 1920. Decided June 25, 1920.)

[191 Pac. 150.]

Highways — Public Lands — Prescription — Evidence — Insufficiency—Pleading and Practice.

Appeal and Error—Evidence—Complaint—When Deemed Amended to Conform to Proof.

1. Where evidence is admitted without objection on a theory not warranted by the complaint, the pleading will on appeal be deemed amended to conform to the proof.

Highways—Injunction Against Closing—Right of Action.

2. If one's land is so situated that he cannot gain ingress or egress for the purposes of cultivation and caring for his livestock, without the use of a road sought to be closed, he has such a special and vital interest in keeping it open, not shared by the public, as entitles him to maintain an action to enjoin its closing.

Same—Public Lands—Nature of Grant of Right of Way.

3. *Held*, that the grant of a right of way for the construction of a highway over public lands not reserved for public use, made by section 2477, U. S. Rev. Stats., is not one *in praesenti*, but is no more than an offer of so much land as may be necessary for the purpose of a right of way, and takes effect or becomes fixed only when a highway is definitely established or constructed in some one of the modes authorized by the laws of the state, *inter alia* by user by the public of the exact route confined to the statutory width of a highway for the period of the statute of limitations as to lands, *i. e.*, ten years.

Same—User—What Insufficient.

4. The mere casual journeying by stockmen, trappers and settlers over what was thereafter claimed to have become a right of way for a public road was insufficient to constitute the trail thereby made a public highway by user.

Same—User—Evidence—Insufficiency.

5. Evidence that a road over public lands had been used "since the early '90's" was not sufficient to establish a right by user prior to July 1, 1895.

[For authorities passing on the question of amendment of pleadings in appellate court to conform to proof, see note in L. R. A. 1916D, 841. On effect of mere use of highway over public domain as acceptance of grant of right of way, see note in 9 L. R. A. (n. s.) 1223.]

Appeal from District Court, Beaverhead County, in the Fifth Judicial District; Jeremiah J. Lynch, a Judge of the Second District, presiding.

PROCEEDING by the State, on the relation of Parley A. Dansie, against Joseph P. Nolan, to enjoin the closing of a road. From an order dissolving a temporary restraining order and denying an injunction *pendente lite*, the relator appeals. Affirmed.

Mr. Wellington D. Rankin, Mr. A. H. McConnell and Mr. C. W. Robinson, for Appellant, submitted a brief; Mr. Rankin argued the cause orally.

By a long and unbroken line of decisions it has been uniformly held that pursuant to the grant by the federal government in section 2477, Revised Statutes of the United States, the mere use of premises for a road over the public domain by the public is sufficient to establish the same as a road. The acceptance of the grant may be made either by the public itself by using the same for a highway, or by public officials assuming control over the same. (See *Van Wanning v. Deeter*, 78 Neb. 282, 110 N. W. 703; *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793.) The length of time that the road was used by the public is immaterial. (*Hughes v. Veal*, 84 Kan. 534, 114 Pac. 1081.) In the case of *Murray v. City of Butte*, 7 Mont. 61, 14 Pac. 656, this court by positive declaration announced that an acceptance of the grant from the federal government may be proven by use and occupation of the land for a road. (See, also, *City of Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Wells v. Pennington County*, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; *Okanogan County v. Cheetham*, 37 Wash. 682, 70 L. R. A. 1027, 80 Pac. 262; *Tholl v. Koles*, 65 Kan. 802, 70 Pac. 881; *Streeter v. Stalnaker*, 61 Neb. 205, 85 N. W. 47.)

That a dedication may be accepted by the general public by user there can be no doubt (18 Corpus Juris, sec. 73), or by legislative enactment (*Id.*, sec. 78; *Keen v. Board of Suprs.*, 8 S. D. 558, 67 N. W. 623; *Smith v. Mitchell*, 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667; *Molyneux v. Grimes*, 78 Kan.

830, 98 Pac. 278; *Cassidy v. Sullivan*, 75 Neb. 847, 106 N. W. 1027.)

Messrs. Norris, Hurd & Collins, for Respondent, submitted a brief; *Mr. John Collins* argued the cause orally.

The complaint is insufficient. Plaintiff merely alleges that he is a sheep-grower, having lands, sheep, camps and equipment. There is nothing to show that plaintiff has suffered injury, either greater in amount or different in character from those suffered by all citizens in the community. The wrongs of which he complains are against the public generally. (22 Cyc. 910; *Gilbert v. Greeley etc. Ry. Co.*, 13 Colo. 501, 22 Pac. 814; *Commissioners of Barber County v. Smith*, 48 Kan. 331, 29 Pac. 565; *Amusement Syndicate Co. v. Topeka*, 68 Kan. 801, 74 Pac. 606.)

The mere user, by a few persons, not settlers, without any affirmative act by the public authorities looking toward the acceptance, construction and improvement of the alleged highway, does not constitute an acceptance of the grant contemplated in section 2477, Revised Statutes of the United States. (*Streeter v. Stalnaker*, 61 Neb. 205, 85 N. W. 47; *Town of Rolling v. Emrich*, 122 Wis. 134, 99 N. W. 464; *Cross v. State*, 147 Ala. 125, 41 South. 875.) Of the necessity of affirmative action by the public authorities, in maintaining a highway acquired by prescription, see *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Montana Ore Pur. Co. v. Butte & B. etc. Min. Co.*, 25 Mont. 427, 65 Pac. 420; *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064.

A highway may not be established under section 2477 by user alone unless shown to have continued for the full statutory period prior to July 1, 1895. (*Vogler v. Anderson*, 46 Wash. 202, 123 Am. St. Rep. 932, 9 L. R. A. (n. s.) 1223, 89 Pac. 551.)

Travel by camp-tenders, cowpunchers, trappers and other migratory persons over public lands, in going to and returning from a public range or hunting grounds, is not such a pub-

lic use as is contemplated in said section. (*Town of Rolling v. Emrich, supra.*)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is a special proceeding to enjoin the defendant from closing a certain road. A temporary restraining order was issued, together with an order to show cause. The defendant moved to dissolve the temporary order and to deny the injunction *pendente lite*, and, in connection therewith, filed an affidavit setting up the facts as he viewed them. The court held the motion in abeyance until the evidence was all in, whereupon its order was entered dissolving the temporary restraining order and denying the injunction *pendente lite*. From this order relator appeals.

The complaint alleges, in substance, that the road in question is a public highway established by prescription, and that "said road crossed the lands of the defendant at the time the defendant entered into possession of the lands owned by him"; that the relator maintains a sheep camp on certain lands owned by him adjoining the lands of the defendant, and that the road in question is the only road by which his lands can be reached; that he desires to cultivate his land and will suffer irreparable injury if deprived of the use of the road. The affidavit filed by defendant supplies the additional facts that defendant is a homestead entryman who filed on the land in the year 1915, and that title is still in the government.

Evidence was introduced on the hearing tending to show that the road in question had been traveled for more than twenty years prior to the commencement of the action, by stockmen and trappers and, since 1915, by settlers in the vicinity. While the testimony is that the trail was traveled since "some time in the early '90's," it discloses that the route was not originally the same as at the time of the commencement of the action.

1. Counsel for defendant contend that the cause was originally tried on the theory of a right by prescription and that relator changed his theory to that of dedication by the government after the order complained of was made. While the complaint is silent as to the nature of the land, the affidavit of defendant remedied this defect, and evidence was submitted, without objection, which would tend to support the latter theory. The complaint will therefore be deemed amended to conform to the proof (*Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, L. R. A. 1916D, 836, 152 Pac. 481; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325; *Post v. Liberty*, 45 Mont. 1, 121 Pac. 475), and we will dispose of the matter on the assumption that the questions here presented were duly presented to the lower court.

2. It is urged that the wrong, if any, was to the general public, and that relator is not entitled to maintain this action. It would seem, however, that if relator's land is so situated that he cannot gain ingress and egress without the use of the road, and that it is necessary for him to pass to and from his land in order to care for his sheep and cultivate his land, he would have a special and vital interest in maintaining the road, not shared by the general public. Such is the holding in *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633. He would therefore, in our opinion, be in a position by reason of the special injury to him, to maintain the action.

3. The only question seriously presented herein is: Was the road, at the time the defendant sought to close it, a public highway?

It is admitted that the road was never constructed or established by order of the county authorities nor by them worked or repaired, other than that, after Nolan settled on the land and constructed an approach to his place, the county, in constructing a cross-road, made this approach impassable and thereafter, on complaint of Nolan, a county employee repaired it to this extent. The contention of relator now is that sec-

tion 2477 of the Revised Statutes of the United States (U. S. Comp. Stats., sec. 4919), which provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted," is a dedication of the public domain for road purposes, and that the enactment of section 1337 of the Revised Codes of 1907 which was enacted in 1903, was an acceptance of the grant as of that date. It is further contended that "By section 1340 of our Codes, it is specifically provided that a road may be established *by use* when a dedication of the same has been made by the owner." The sections of the Code referred to read as follows:

"Sec. 1337. All highways, roads, streets, alleys, courts, places and bridges laid out or erected by the public or now traveled or used by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such by the partition of real property, are public highways."

"Sec. 1340. A highway laid out and worked and used as provided in this Act must not be vacated or cease to be a highway until so ordered by the board of county commissioners of the county in which said road may be located; and no route of travel used by one or more persons over another's land shall hereafter become a public road or byway [highway!] by use, or until so declared by the board of county commissioners, or by dedication by the owner of the land affected."

These provisions are not, however, as counsel seem to urge, original declarations on the subjects embraced, but are merely the re-enactment, on the codification of the highway laws, of sections 2600 and 2603 of the Political Code adopted July 1, 1895, and any change in the law or in the status of the public by reason of such declarations must be considered as of the last-mentioned date.

Section 2477 of the Revised Statutes of the United States [3] goes no further than to grant a right of way for the *construction* of a highway across public lands; it does not extend to the entire tract of land and cannot constitute a "dedica-

tion by the owner of the land," as contemplated by that portion of section 1340, Revised Codes, relied on by counsel. It is inconceivable that it was the intention of Congress and of the legislature to say that two or more persons crossing at random on each of a dozen trails across an open quarter-section of land could constitute an acceptance of the government grant as to each of such trails, and the entire quarter-section thus become but a series of irregular and divergent rights of way. The grant is but an offer of the right of way for the construction of a public highway on some particular strip of public land, and can only become fixed when a highway is definitely established and constructed in some one of the ways authorized by the laws of the state in which the land is situated.

Prior to July 1, 1895, a public highway could have been established either by the act of the proper authorities, as provided by the statute, or by use by the public, for the period of the statute of limitations as to lands, of the exact route confined to the statutory width of a highway, later claimed to be a public highway, or by the opening and dedication of a road by an individual owner of the land, or on a partition of real property. On that date it was declared by section 1340 that thereafter no route of travel used by one or more persons over the lands of another should become a public highway, except in the manner provided in the statute. Whether the establishment of the road was before or since July 1, 1895, by whatever method it was accomplished, it must have been under [4] some legal authority; the mere casual journeying over what might thereafter become the right of way for a public road could not constitute the trail, thereby made, a public highway. In other words, the government, by the enactment of section 2477 of the Revised Statutes, offered to the public the right of way for such highways across the public lands as may be found to be necessary; but this offer can only be accepted by the "construction" of a public highway in some one of the ways in which they can be legally established, and

becomes effective as a right of way only when the road is thus finally constructed. If, therefore, the offer is accepted by user under the laws of this state, that user must be shown to have continued over the exact route claimed, for the statutory period prior to July 1, 1895.

Sections 1337 and 1340 were repealed in 1913 (Laws 1913, p. 139); but the provisions of section 1337 were re-enacted as section 3 of Chapter 1 of the "General Highway Law," and, on the amendment thereof, were continued in force (Laws 1915, p. 319). The provision contained in section 1340, concerning the establishment of a road by use, does not appear in the "General Highway Law" of 1913-15. However, whatever the effect of the omission, it cannot aid relator in this action, as the period of the statute of limitations referred to is ten years. (Sec. 6432, Rev. Codes.)

This precise question was before the supreme court of Washington in the case of *Vogler v. Anderson*, 46 Wash. 202, 123 Am. St. Rep. 932, 9 L. R. A. (n. s.) 1223, 89 Pac. 551, and it was there said: "The trial court based its judgment on the theory that the Act of Congress granting a right of way for the construction of public highways over public lands not reserved for public use was a grant *in praesenti*, and became effective the moment the public began using the way as a public highway, and that it is not necessary that a way should be used for any specific time in order to constitute an acceptance of it as a grant under this statute. * * * But it was not said, or intended to be said, that a user for any lesser period than seven years would be sufficient for that purpose. On the contrary, to hold that a lesser period would suffice in this state would violate the terms of the grant made by Congress. The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect. * * * The shortest period allowed by statute to establish a highway by user in this state is seven years, * * * and

no user short of this period can therefore be held to be an acceptance of the grant contained in the Act of Congress cited."

In 1898 this court, in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, held that "Section 2600, Political Code [now section 1337, Rev. Codes] * * * must, in so far as applicable here, be interpreted as a remedial statute, curing irregularities, but not supplying jurisdiction, where none was acquired, in the creation of the roads, and as recognizing the existence of highways by prescription when they had been used or traveled by the people generally for the period named in the statutes of limitation. It is also doubtless true that if the road had been used and traveled by the public generally as a highway, and is treated and kept in repair as such by the local authorities whose duty it is to open and keep in repair public roads, proof of these facts 'furnishes a legal presumption, liable to be rebutted, that such a road is a public highway.'"

The case of *Murray v. City of Butte*, 7 Mont. 61, 14 Pac. 656, cited by counsel as sustaining relator's contention, is not in conflict with the declaration in the *Auchard Case*, or with anything said herein. At the time the opinion was rendered, the statutory period was five years (sec. 29, Chap. II, Title III, Comp. Stats. 1887). The answer showed that the road in question had been in existence since 1866; plaintiff's notice of location was filed in 1875. The court said: "Section 2477 was a grant by the government of an easement, and defendant sought to prove an acceptance prior to the location upon which the patent was based. If such an acceptance of the grant of the easement could have been established, it would have been valid against the government." The proof suggested would, we take it, have been that of a right by prescription.

Likewise the opinion in the case of *Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593, but bears out the statement that the proof offered must show the establishment of a road in some one of the ways recognized by law in order to constitute an acceptance of the grant.

In *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064, this court, in commenting on sections 1337 and 1340, said: "We are not now concerned with the question whether it was the intention of the legislature to declare all roads then in use to be public highways, without reference to how long the use had continued or what the character of use had been. We think, however, as was said in *State v. Auchard*, 22 Mont. 14, 55 Pac. 361, that the intention was to declare those only to be public highways which had been established by the public authorities, or were recognized by them and used generally by the public, or which had become such by prescription or adverse use at the time the provision was enacted. Any other view would, in our opinion, render the legislation open to serious constitutional objection (Const., sec. 14, Art. III). Be this as it may, the second section clearly evinces the intention that no highway falling within the enumeration contained in the former section should be vacated except by the public authorities, and that no route of travel should thereafter become of public right until declared so by the public authorities or had been made so by dedication by the owner of the land affected. * * * By these enactments the legislature explicitly declared it to be the rule that after July 1, 1895, when the Codes went into effect, a highway could not be established by use unless the use should be accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway."

In *Montana Ore. Pur. Co. v. Butte & B. Consol. Min. Co.*, 25 Mont. 427, 65 Pac. 421, this court held: "Where the claim is founded upon use only, without color of title, it must appear that the use has been confined to the particular way for the full time of the prescribed limitation. (*State v. Auchard, supra.*) Travel by the public generally over uninclosed land, but not confined to any particular way, will not inaugurate such an adverse claim as will * * * ripen into a right which may be asserted against the owner."

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Mr. CHIEF JUSTICE BREWER and ASSOCIATE JUSTICES
HOLLANDAY, ELLIS and JAMES SMITH

STATE ATTORNEY & CHIEF DEPARTMENT

U.S. AIR FORCE

(Submitted June 3, 1991 Received June 25, 1991)

SECRET

Criminal Law—Homicide—Circumstantial Evidence—Incompetency—Acquittal—Directed Verdict.

Criminal Law—Circumstantial Evidence—Bols.

1. To sustain a conviction on circumstantial evidence the circumstantial circumstances must not only be consistent with each other, but must also point clearly to the guilt of the accused, or be inconsistent with any other rational hypothesis.

Homicide — Circumstantial Evidence — Insufficiency — Acquittal — Directed Verdict—When Proper.

2. Where, in a prosecution for homicide in which the evidence was entirely circumstantial, some of the circumstances proved, considered apart from the rest of the evidence, tended to incriminate defendant, while others, proof of which could not be questioned, so far explained the criminatory force of the former, that they left no substantial basis for the conclusion of his guilt, it was the duty of the trial judge to direct the jury to return a verdict of not guilty.

Criminal Law—Advising and Directing Acquittal—Statutes.

3. *Held*, that section 9297, Revised Codes, providing that the district court may advise the jury to acquit (which advice they may disregard) applies only where the court deems the evidence, though tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant conviction, and not where the evidence is wholly insufficient to sustain a conviction, in which event a direction to acquit is the proper procedure.

Appeal from District Court, Silver Bow County; J. V. Dwyer, Judge.

FELIX GOMEZ was charged for murder, and, an acquittal having been directed, the state appeals. Order affirmed.

Mr. S. C. Ford, Attorney General, Mr. Frank Woody, Assistant Attorney General, and Mr. Jos. E. Jackson, Mr. A. C. McDaniel and Mr. N. A. Roterling, for Appellant, submitted a brief; Mr. Roterling argued the cause orally.

From the facts appearing in the record, together with the flight of Felix Gomez, we believe that a sufficient showing was made to take the case to the jury. He knew that murder was about to be committed. He had been invited to go back and assist in the killing. He went back, and, if not actually doing the killing, he stood by ready to render any assistance necessary.

This case may be compared with *State v. Hayes*, 38 Mont. 219, 99 Pac. 434; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721; *State v. Hurst*, 23 Mont. 484, 59 Pac. 911; *Smith v. People*, 1 Colo. 121, 138; *State v. Darling*, 216 Mo. 450, 129 Am. St. Rep. 526, 23 L. R. A. (n. s.) 272, 115 S. W. 1002; *State v. Wilson*, 10 Wash. 402, 39 Pac. 106, where the sufficiency of the evidence to connect the defendant with the crime is discussed.

Mr. James B. O'Flynn and Mr. L. E. Haven, for Respondent, submitted a brief.

Section 9297, Revised Codes, is applicable to those cases only in which the trial court deems the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction. Interpretation of this section may be found in *State v. Mahoney*, 24 Mont. 281, 286, 61 Pac. 647; *State v. Welch*, 22 Mont. 92, 99, 55 Pac. 927, 928; *State v. Fisher*, 23 Mont. 540, 555, 59 Pac. 919, 923.

The question here is whether there was sufficient evidence to warrant the court in advising the jury to acquit the defendant. *People v. Horn* (Cal.), 11 Pac. 470, is a parallel case absolutely in point, the court holding: "We cannot here inquire whether the verdict was sustained by the evidence." "If, through misdirection of the judge in matter of law, * * * a verdict is improperly rendered, it can never afterward, on application of the prosecution in any form of proceedings, be set aside." "A legislative provision for the rehearing of a criminal cause cannot be interpreted to violate the constitutional rule." (1 Bishop on Criminal Law, 665.)

The statute makes it purely discretionary with the court, and it is quite evident from the testimony introduced in the trial of the case that the evidence was insufficient to warrant a conviction; therefore, the court did not err in so advising the jury, and the judgment should be affirmed.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, Felix Gomez, and two others, Ben Gomez and Crescenciano Rodriguez, were jointly charged with the murder of one Juan Domingo at Divide, a station on the Oregon Short Line Railway in Silver Bow county, on March 17, 1918. They were awarded separate trials. Ben Gomez was convicted of manslaughter and Rodriguez of murder in the second degree. At the close of the state's case on the trial of Felix Gomez, the court, on motion of his counsel, ordered the jury to return a verdict in his favor. From this order the state has appealed. The question for decision is whether the evidence was sufficient to require the case to be submitted to the jury.

The evidence is entirely circumstantial. It would serve no useful purpose to recapitulate and analyze it in detail. It is sufficient to say that after a careful study of it we are of the opinion that, taking it as a whole, it does not meet the re-
[1] quirements of the rule applicable to such cases, viz., that

when a conviction is sought upon circumstantial evidence the criminatory circumstances proved must not only be consistent with each other but also point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis. (*State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Woods*, 54 Mont. 193, 169 Pac. 39.) Some of the circumstances proved, considered apart from the rest of the evidence, tend to incriminate the accused; but other circumstances, the proof of which cannot be questioned, so far explain and destroy the criminatory force of the former that they leave no substantial basis in the evidence for the conclusion that the accused had anything to do with the homicide. In other words, there was no substantial evidence upon which to base a verdict of guilty. This being the condition of the evidence, if the case had been submitted to the jury and a verdict of guilty had been returned, it would have been obligatory on the trial court, on motion addressed to it, to grant the defendant a new trial. It was therefore its duty at the close of the evidence to order the jury, as it did, to return a verdict of not guilty. (*Territory v. Laun*, 8 Mont. 322, 20 Pac. 652; *State v. Welch*, 22 Mont. 92, 55 Pac. 927; *State v. Foster*, 26 Mont. 71, 66 Pac. 565.)

Contention was made by the attorney general during the argument that the court should have advised the jury to acquit the defendant instead of peremptorily instructing them to do so. The statute (Rev. Codes, sec. 9297) "is applicable to those cases only in which the trial court deems the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction." (*State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.) It has no application to the facts of this case.

The order is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

**ELLIS, APPELLANT, v. HALE ET AL., DEFENDANTS; CORN-
WELL ET AL., RESPONDENTS.**

(No. 4,130.)

(Submitted April 12, 1920. Decided June 25, 1920.)

[194 Pac. 155.]

*Notaries Public—Official Bonds—Fraud—Sureties—Liability—
Burden of Proof—Failure of Proof.*

Notary Public—Official Bonds—Sureties—When Liable.

1. Under section 326, Revised Codes, the sureties on the official bond of a notary public are liable only for injury which results proximately from his official misconduct or neglect.

Same—False Acknowledgment to Real Estate Mortgage—Damages—Burden of Proof.

2. Official misconduct of a notary public in making a false acknowledgment to a real estate mortgage was not alone sufficient to render the sureties on his official bond liable for the damages flowing from the fraudulent act; to have this effect it was necessary for plaintiff to show that he parted with value in reliance upon the verity of the acknowledgment.

Same—Damages—Failure of Proof.

3. Plaintiff, a real estate and loan agent, had made a loan upon a mortgage in which a client was named as mortgagee, the acknowledgment to which instrument had been forged by a notary public who embezzled the amount of the note supposedly secured by it sent to him to be paid over to the mortgagors. The mortgagee transferred the note and mortgage to another, to whom, upon discovery of the fraud, plaintiff of his own motion repaid the amount expended by him. *Held*, in an action against the sureties on the official bond of the notary, that, in the absence of evidence showing that he parted with his money, when he voluntarily repaid the transferee, in reliance upon the forged acknowledgment, he failed to make out his case, and that judgment in favor of defendants was proper.

Appeal from District Court, Rosebud County; Charles L. Crum, Judge.

ACTION by Bradford H. Ellis against E. A. Cornwell and another. Judgment for defendant. Plaintiff appeals. Affirmed.

Mr. James A. Walsh, for Appellant, submitted a brief and argued the cause orally.

Section 324 of the Revised Codes provides that each notary public shall give a bond in the sum of \$1,000. This is for the protection of persons who may be injured by the acts of the

notary public. The bondsmen are responsible for any acts of the notary public by which others are injured. (*Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519; *Doran v. Butler* (*People v. Butler*), 74 Mich. 643, 42 N. W. 273; *Stork v. American Surety Co.*, 109 La. 713, 33 South. 742; *State v. Ogden*, 187 Mo. App. 39, 172 S. W. 1172; *Peterson v. Mahon*, 27 N. D. 92, 145 N. W. 596; *McLenden v. American Freehold Land & Mtg. Co.*, 119 Ala. 518, 24 South. 721; *Wilson v. Gribben*, 152 Iowa, 379, 132 N. W. 849; *Homan v. Wayer*, 9 Cal. App. 123, 98 Pac. 80; *Bartels v. People* (*Wolfe v. People*), 152 Ill. 557, 38 N. E. 898; *Kleinpeter v. Castro*, 11 Cal. App. 83, 103 Pac. 1090; *Weintz v. Kramer*, 44 La. Ann. 35, 10 South. 416; *People v. Bartel*, 138 Ill. 322, 27 N. E. 1091; *Fogarty v. Finlay*, 10 Cal. 239, 70 Am. Dec. 714; *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966; *State ex rel. Savings & Trust Co. v. Hallen*, 165 Mo. App. 422, 146 S. W. 1171.)

The mortgage and note here involved were assigned to Frank J. Fenn. When it was discovered that the certificate was false, Fenn assigned the note and mortgage, together with his cause of action, to the plaintiff in this case. Any owner of the mortgage had a right of action against the notary public and his bondsmen for damages suffered by reason of any act of the former. That right of action was assignable. (*Caledonia Ins. Co. v. Northern Pac. R. Co.*, 32 Mont. 46, 49, 79 Pac. 544; *Parnell v. Davenport*, 36 Mont. 571, 573, 93 Pac. 939; *Flinner v. McVay*, 37 Mont. 306, 313, 15 Ann. Cas. 1175, 19 L. R. A. (n. s.) 879, 96 Pac. 340; *Crumlish's Admr. v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.)

In business transactions the intent of the parties to a contract should have a controlling influence. If the parties did not intend that the receipt of money by one should be accepted by him as a payment and that the other party paid it over with the intent that it should be a payment, the courts should not, without any evidence, say that the parties intended something that they did not express in the contract, but, on the contrary,

clearly expressed their intention that the money should not be paid or accepted as a payment, but that it was given as a consideration for an assignment. (*Gernon v. McCan*, 23 La. Ann. 84; *Hill v. King*, 48 Ohio St. 75, 26 N. E. 988; *Stevens v. King*, 84 Me. 291, 24 Atl. 850; *Coe v. Jersey M. R. Co.*, 31 N. J. Eq. 105; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794; *Hall v. Taylor*, 18 W. Va. 544.)

It was strenuously argued in the court below, and the court seemed to give great weight to the argument, that the plaintiff in this case and Hale were joint tort-feasors, and therefore the plaintiff could not ask for contribution or enforce a liability. Even if Hale and the plaintiff were engaged together in the loaning business and Hale, without knowledge or consent of the plaintiff, executed and issued the false certificate, the plaintiff would be entitled to recover. The rule that one joint tort-feasor cannot recover from another has many exceptions. To prevent a recovery both must have acted knowingly and willfully. The rule is that where one person acts innocently, although he may have participated in doing the act, and he is compelled to pay the damages sustained, he can recover from the one who was responsible for the wrong. (See *Cooley on Torts*, 1st ed., 147, 148; *Pollock on Torts*, 231, 232; *Armstrong County v. Clarion County*, 66 Pa. St. 218, 5 Am. Rep. 368; *Farwell v. Becker*, 129 Ill. 261, 16 Am. St. Rep. 267, 6 L. R. A. 400, 21 N. E. 792; *Van Diver v. Pollack*, 97 Ala. 467, 19 L. R. A. 628, 12 South. 473; *Gray v. Boston Gaslight Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Westfield v. Mayo*, 122 Mass. 100, 23 Am. Rep. 292.)

Mr. Sterling Wood and *Mr. Donald Campbell*, for Respondents, submitted a brief; *Mr. Campbell* argued the cause orally.

The appellant cannot recover in this action, because the payment made by him to Fenn, and the attempted assignment of Fenn's cause of action to appellant, operated as a complete satisfaction and discharge of Fenn's claim and a release of Hale and his bondsmen from further liability. The re-

spondents ground themselves squarely upon the rules and principles of law announced by this court in the following cases: *Tanner v. Bowen*, 34 Mont. 121, 115 Am. St. Rep. 529, 9 Ann. Cas. 517, 7 L. R. A. (n. s.) 534, 85 Pac. 876; *Penwell v. Flickinger et al.*, 46 Mont. 526, 129 Pac. 323. The appellant was a stranger and a pure volunteer so far as Fenn was concerned. He paid Fenn in full for the loss which Fenn was about to sustain. He thereby settled and discharged any action which he, Fenn, might have had against Dana, or any possible claim or right of action which he, Fenn, might have had against Hale and his bondsmen; he settled for the damage occasioned by the manufacture and negotiation of these securities, he liquidated the damage occasioned to Dana by the tortious acts of Hale. Any damage that had been occasioned or could be occasioned by any tort that had been committed by any of the parties in these transactions was fully compensated, and any right of action which existed in favor of anyone was extinguished. Dana took the money from Ellis in full satisfaction of his injury. The record discloses that Ellis, recognizing a moral obligation, voluntarily paid Fenn and thereafter took the assignment in question. We submit there was nothing to assign, and no good purpose can be served by a discussion of the several cases cited under this head in appellant's brief.

The defendant Hale and Ellis were joint tort-feasors. The record in this case shows that C. F. Ellis & Company were acting as agents for Richard H. Dana, Jr., in the loaning of money. The relation between Dana and Ellis & Company was that of principal and agent. Ellis & Company owed Dana the duty to see that Dana's money was properly and safely invested and that he obtained good and valid securities. Ellis & Company, agents, employed an agent, in this instance Hale, or the Rosebud Abstract Company. Hale forged the mortgage in question, took Dana's money and absconded. Ellis & Company in turn passed the forged instrument to Dana. The fact that Ellis & Company were ignorant of the forgery would in

no wise affect their liability to Dana. Ellis & Company were responsible for the acts of their agent and Dana could have sued the company or Hale, or the two jointly. The rule is thoroughly discussed in Cooley on Torts, 2d ed., pp. 162-166. The company being innocent of any intentional wrong, would have the right of contribution as against Hale for any amount for which they might be held liable to Dana. (*Id.*, pp. 166-184; 38 Cyc. 493, 1088.) The company, acting through the appellant, having made settlement, there was nothing which they or this appellant could take from Fenn by this assignment.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Early in 1915, Newton Sanders applied to C. F. Ellis & Co. for a loan of \$1,000, to be secured by a mortgage upon real estate situated in Rosebud county. The application was approved and a note payable to Richard H. Dana, Jr., and a mortgage in which Dana was named mortgagee, were forwarded by Ellis & Co. to Edgar H. Hale at Forsyth, to be executed by Sanders and wife. About April 12 the papers were returned apparently properly executed, the acknowledgment to the mortgage purporting to have been made by Sanders and wife before Hale as notary public. On April 12 a check payable to Hale, for the amount of the loan less certain expenses, was sent to Hale. The check was signed by Ellis & Co., was cashed by Hale, the money embezzled, and Hale absconded. Later it developed that the purported signatures of Sanders and wife were forgeries and the acknowledgment false and fraudulent. Before the fraud was discovered, and on May 7, Richard H. Dana, Jr., by Charles F. Ellis, his attorney in fact, transferred the note and mortgage for value to Frank J. Fenn. As soon as the fraud was discovered, Bradford H. Ellis, of his own motion, repaid to Fenn the amount Fenn had paid for the note and mortgage, and a few days later took from Fenn an assignment of any right of ac-

tion which Fenn had against Hale and the sureties on his notarial bond, and soon thereafter commenced this action. The sureties appeared by answer and upon the trial a verdict in their favor was directed by the court. From the judgment dismissing his complaint and from an order denying his motion for a new trial, plaintiff appealed.

Every material allegation of the complaint was put in issue [1-3] by the answer. The burden was imposed upon the plaintiff to prove the case made by his pleading and in this he failed signally. Section 326, Revised Codes, defines the liability of the sureties on the official bond of a notary public as follows: "For the official misconduct or neglect of a notary public, he, and the sureties on his official bond, are liable to the parties injured thereby for all damages sustained." The language is reasonably clear and, when tested by the rules of construction applicable, leaves no room for doubt. The sureties are liable for injury which results proximately from the official misconduct or neglect of the notary. This is the meaning of the statute above. (*Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519.) Neglect is not charged against Hale, but it is alleged that he made a false and fraudulent acknowledgment to the mortgage. This fact alone, however, would not render the sureties liable. In order to constitute Hale's fraudulent act a proximate cause of injury, someone must have parted with value in reliance upon the verity of the certificate. Who, then, could have sustained such injury as would have given rise to a cause of action against these sureties?

First: Dana, provided he parted with his money in reliance upon the truth of the statements contained in the certificate, and he might have acted in person or by agent; but if the money transmitted to Hale was not his money, he suffered no injury and had no cause of action. It is not alleged specifically that the money belonged to Dana and there is not even a scintilla of evidence that it was his money. The only reference to the subject is found in the cross-examination of plaintiff when, after testifying to the valuation placed upon the

Sanders land, he answered a question as follows: "Q. That was your valuation and on the strength of that valuation you recommended a loan, did you, of \$1,000 of Mr. Dana's money? A. Yes." Whether the money thereafter sent to Hale was Dana's money, the money of plaintiff, the property of C. F. Ellis & Co., or the money of someone else, is left to conjecture. Neither is there any evidence that Dana relied upon the notary's certificate or that he ever knew of the transaction. This plaintiff testified that he (plaintiff) relied upon the verity of the certificate. He alleges in his complaint that he represented Dana in loaning money in this state, but that allegation was denied and there is no evidence even tending to support it; neither is there any evidence tending to prove that plaintiff was the agent of Dana in this particular transaction. The record discloses, on the contrary, that Charles F. Ellis had a power of attorney from Dana and the correspondence concerning this loan was all with C. F. Ellis & Co. Just what was the legal status of C. F. Ellis & Co. is not made apparent. There is not a syllable of evidence to show whether C. F. Ellis & Co. was a corporation, a copartnership, or merely a fictitious name under which someone did business. In other words, there is not any evidence that Dana suffered injury by reason of his reliance upon the notary's certificate, and therefore he had no cause of action which he could assert and none which he could transfer to Fenn.

Second: Fenn would have had a cause of action if, when he purchased the note and mortgage, he parted with his money in reliance upon the notary's certificate; but Fenn was not called as a witness and there is not even a suggestion in the record that he ever examined the certificate or placed any reliance whatever upon it; so that, so far as he is concerned, this record fails altogether to disclose that he had any cause of action against these sureties, and since the only cause of action attempted to be stated in the complaint herein is one which Bradford H. Ellis procured from Fenn by virtue of the

assignment, it follows that the evidence fails to make out the case stated.

The authorities are in accord in supporting the rules announced above. (*State ex rel. Mathews v. Boughton*, 58 Mo. App. 155; *People v. Nederlander*, 177 Mich. 434, Ann. Cas. 1915C, 1026, 143 N. W. 753; 1 Corpus Juris, 902; 20 R. C. L. 336; note to *Joost v. Craig*, 82 Am. St. Rep. 380; John's American Notaries, sec. 17.)

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

Rehearing denied September 27, 1920.

COBBAN REALTY CO., RESPONDENT, v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO. ET AL., APPELLANTS.

(No. 4,243.)

(Submitted May 27, 1920. Decided June 25, 1920.)

[190 Pac. 988.]

Quieting Title—Construction of Deeds—Burden of Proof—Failure of Proof—Estoppel.

Deeds—Construction—Doctrine of the Last Antecedent—Applicability.

1. The rule that in the construction of a statute, relative and qualifying words, phrases and clauses must, under the doctrine of the last antecedent, be applied to the word or phrase immediately preceding, and are not to be construed as extending to or including others more remote, is applicable to the construction of deeds.

Same—Object of Construction.

2. The object in construing a deed is to ascertain the intention of the parties to it.

Same—Description of Property—Estoppel.

3. Where a railway company seeking to obtain a right of way furnished the data, including the right of way map, from which the description in a deed to the railroad was obtained, the company was

estopped to say that it did not intend that the description in the deed should operate to convey the ground shown upon the map.

Same—Quieting Title—Burden of Proof—Failure of Proof.

4. Where, in an action to quiet title, the issue was the location of a railroad right of way upon plaintiff's land and the burden of proof was, by stipulation, upon the railway company to show that the ground occupied by it was conveyed to it by a deed, failure to prove its location with reference to the land claimed by plaintiff amounted to a failure of proof and warranted judgment for plaintiff.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by the R. M. Cobban Realty Company, a corporation, against the Chicago, Milwaukee & St. Paul Railway Company of Montana and another. From a judgment for plaintiff and an order denying them a new trial, defendants appeal. Affirmed.

Messrs. Murphy & Whitlock, for Appellants, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

Mr. Elmer E. Hershey, for Respondent, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Upon a former appeal the judgment in favor of the defendants was reversed and a new trial ordered (52 Mont. 256, 157 Pac. 173). A statement of the case with illustrating maps will be found in our former opinion and need not be repeated here. Upon the second trial the court found the issues in favor of plaintiff, and defendants appealed from the judgment and from an order denying a new trial.

There was not any new evidence presented, and only a portion of the evidence employed in the first trial was introduced upon the second trial. The same stipulation used upon the first trial was renewed for the purpose of the second trial, and this stipulation, the Weirick deed, and the defendants' right of way map were introduced by plaintiff.

At the instance of the defendants, the deposition of C. F. Healy, used at the first trial, was received in evidence, and in rebuttal the witness Jones testified to substantially the same facts as upon the first trial. A more specific reference to this evidence will be found in our former opinion. Upon the second trial the defendants abandoned each of the affirmative defenses pleaded in their answer—estoppel *in pais* and mutual mistake—and relied altogether upon the conveyance evidenced by the Weirick deed. In our former opinion we construed the stipulation above, and determined that it “relieves the plaintiff of the necessity of deraigning its title and shifts the burden of proof to the defendants.” Under the terms of this stipulation (omitting any reference to the defense of estoppel, which was abandoned), plaintiff was entitled to judgment unless the defendants could show that the ground in controversy was conveyed to the railway company by the Weirick deed. If the terms of the deed be considered independently of the circumstances surrounding their preparation, the meaning of the instrument is not open to serious controversy. It conveys that portion of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 20, township 13 north, range 19 west, hereinafter referred to as the 40-acre tract, described as follows: “Beginning at a point of intersection of the E. side line of said above-described tract of land, and the center line of the said right of way of the Chicago, Milwaukee & St. Paul Railway Company of Montana, as the same is now surveyed, located, and staked out upon the ground over and across the said S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$; thence running south on and along said E. side line of said tract of land a distance of 50 feet to the S. E. corner thereof; thence running west on and along the S. side line of said tract of land to an intersection with the E. side line of lot No. 15 in Cobban & Dissmore Orchard Homes addition to Missoula, Mont.; thence north on and along the E. side line of said lot No. 15 a distance of 100 feet; thence running east on a line parallel to and 50 feet north of the said center line of the railway of the party of the second part to a point on the

E. side line of the said S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section No. 20; thence running south 50 feet to place of beginning."

Under the familiar rule of construction known as the doctrine of the last antecedent, relative and qualifying words, [1] phrases and clauses are to be applied to the word or phrase immediately preceding, and are not to be construed as extending to or including others more remote. (*State v. Centennial Brewing Co.*, 55 Mont. 500, 178 Pac. 296.) The rule is applicable to the construction of deeds as well as statutes. (*Grooms v. Morrison*, 249 Mo. 544, 155 S. W. 430.) Applying this rule to the language employed in the description above, and the phrase "said above-described tract of land," and the phrase "said tract of land," each and every one of them refers to the 40-acre tract, and not to the right of way.

It is elementary that the object in construing a deed is to [2, 3] ascertain the intention of the parties to it (*Hollensteiner v. Missoula Lumber Co.*, 37 Mont. 278, 96 Pac. 420), and conceding that the rule of the last antecedent is only an aid in interpretation and must give way to the intention of the parties if its application involves a conflict with such intention, we are led to inquire: What were the surrounding circumstances which indicate the intention of the parties at the time this deed was prepared and executed? The evidence is uncontroverted that the railway company seeking to obtain a right of way over this 40-acre tract furnished the data, including its right of way map (Figure 1, 52 Mont. 258, 157 Pac. 173), from which the description in the deed was obtained, and that map not only photographed, as it were, the strip of ground to be conveyed as the south 100 feet of the 40, but showed the south line of the strip to be identical with the south boundary line of the 40 and added emphasis to that fact by writing on the identical line the words " $\frac{1}{4}$ section line" and "right of way line." It would do violence to every conception of right to permit the railway company to say now that it did not intend that the description in the deed should

operate to convey the ground shown upon the right of way map as the ground it proposed to acquire. But counsel for defendants in their brief say: "The record will be searched in vain for any proof which even tends to show that the south line of the 40-acre tract is not the same as is the south line of the land occupied as right of way." This statement is correct, but, if there is a failure of proof, the fault lies with the defendants, for they had the burden of proof.

If it is a fact that the ground occupied by the right of way is the identical strip shown upon the right of way map, then defendants should have disclaimed, for they have no interest whatever in the ground claimed by plaintiff; but, from the fact that they are before this court defending this action and insisting upon a construction of the deed which will give to them the strip of ground illustrated by Figure 2 (52 Mont. 258, 157 Pac. 173), it is fairly deducible that they are making some claim to the ground in controversy.

By the terms of the stipulation the burden was imposed [4] upon the defendants to prove that the ground occupied by the right of way was conveyed by the Weirick deed, and to establish this fact it was necessary not merely to show that a strip of ground 100 feet wide—50 feet on each side of the center line of the railway—was conveyed, but as well to show its location with reference to the land claimed by plaintiff, and in this they failed.

If any officer or agent of defendants knows where its right of way is located upon the 40-acre tract above, he refrained from furnishing the information to the court. The engineer, Healy, whose testimony constitutes all the evidence offered by defendants, declined to fix its location and professed to be unable to do so. Healy's testimony merely establishes the fact that the center line of the right way was surveyed and staked out before the deed was prepared or executed; that the road-bed was constructed and the road has since been operated upon that line, but where that line is situated with reference to the ground claimed by plaintiff no one seems to know. There is

a failure of proof, and, since the burden of proof was imposed upon defendants, the failure is theirs.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

DANIEL, RESPONDENT, v. MONCURE, APPELLANT.

(No. 4,170.)

(Submitted June 1, 1920. Decided June 25, 1920.)

[190 Pac. 983.]

Slander—Complaint—Insufficiency — Pleading—Defenses—Admissions.

Slander—Complaint—Contents, if Language not Slanderous Per Se.

1. If alleged slanderous language is not slanderous *per se*, special damages must be pleaded, else the complaint does not state a cause of action.

Same—Complaint.

2. Where language charged to have been slanderous, in and of itself is not defamatory, but becomes so only in the light of the circumstances surrounding the utterance, the extrinsic facts disclosing its slanderous character must be pleaded.

Same—Construction of Language.

3. Alleged defamatory matter must be construed as an entirety and with reference to the remaining portion of the conversation giving rise to an action for slander.

Same.

4. Alleged slanderous words are to be construed according to their usual, popular and natural meaning and common acceptance; that is, in the sense in which persons out of court and of ordinary intelligence would understand them, the presumption being that third parties present so understood them.

Same—Innuendo.

5. Language not slanderous *per se* cannot be made so by innuendo.

Same—Defamatory Language—Jury Question.

6. If language is susceptible of two meanings, one defamatory, and the other not, it is for the jury to determine in which sense it is used.

Same—What Language not Slanderous Per Se.

7. *Held*, that a statement that plaintiff, a woman, was the "toughest and commonest thing" on an Indian reservation was not, in the ab-

sence of prefatory allegations disclosing that the language was used in a defamatory sense to denote want of chastity, slanderous *per se*.

Pleading—Inconsistent Defenses.

8. In a civil action, defendant may interpose as many defenses as he may have, even if they are inconsistent, provided they are not so far inconsistent that, if one be true, the other must necessarily be false.

Slander—Pleading—Defenses—Admissions.

9. *Held*, under the above rule (par. 8), that where defendant, after denying generally the allegations of the complaint in an action for slander, pleaded as a justification that the supposed defamatory language was true, did not amount to a confession of the charge in the complaint or supply allegations in the complaint necessary to make the language slanderous *per se*.

[On effect of innuendo as defense to truth to civil action for libel or slander, see notes in 31 L. R. A. (n. s.) 140; 50 L. R. A. (n. s.) 1043. Innuendo in complaint for libel, see note in 3 A. L. R. 1585.]

Appeal from District Court, Big Horn County; Charles L. Crum, Judge.

ACTION for slander by Marie Allen Daniel against W. P. Moncure. Judgment for plaintiff. Defendant appeals from the judgment and an order denying her a new trial. Reversed and remanded.

Mr. F. B. Reynolds, for Appellant, submitted a brief and argued the cause orally.

It is the contention of defendant that the alleged slanderous words set forth in the complaint and testified to by plaintiff

t slanderous *per se*, and inasmuch as s *per se*, the complaint fails to state a the same reason the evidence is insufficient and judgment in behalf of plain-

itory words are not slanderous *per se*, ls to state a cause of action, unless eged. (25 Cyc. 265; *Brown v. Inde-* ont. 374, 138 Pac. 258; *Ledlie v. Wal-* Pac. 289.) The only damages alleged laint are that she "has suffered great shame, has been thereby greatly in-

jured in her feeling and reputation, and by reason of the facts and premises aforesaid, has been damaged in the sum of twenty thousand dollars." Such an allegation is not an allegation of special damage. In order to constitute special damage, there must be a pecuniary loss or some other definite loss which may be pleaded with certainty. (*Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289.)

The language used in the complaint is, "She is the damnedest, commonest, toughest thing around here." The question then is, Are the words, "damnedest," "commonest," "toughest thing around here," slanderous *per se*?

In order to be slanderous *per se*, the expression in and of itself must contain an imputation of unchastity, regardless of innuendo. The innuendo cannot make them slanderous *per se*. (25 Cyc. 450; *Cooper v. Romney*, 49 Mont. 119, 125 Ann. Cas. 1916A, 596, 141 Pac. 289; *Brown v. Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258; *Nichols v. Daily R. Co.*, 30 Utah, 74, 116 Am. St. Rep. 796, 8 Ann. Cas. 841, 3 L. R. A. (n. s) 339, 83 Pac. 573; *Paxton v. Woodward*, 31 Mont. 195, 107 Am. St. Rep. 416, 78 Pac. 215; *Lemmer v. Tribune*, 50 Mont. 559, 148 Pac. 338; *Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509; *Brinsfield v. Howeth*, 107 Md. 278, 24 L. R. A. (n. s) 583, 68 Atl. 566.) Mere words of abuse are not slanderous *per se*, even though insulting, degrading and humiliating. (25 Cyc. 268; *Ledlie v. Wallen*, *supra*.)

The decisions of the courts are full of a great number of illustrations of low and degrading terms that have been used toward women, but no matter how low or degrading, unless these words in themselves necessarily impute unchastity, they are not slanderous *per se*. The following cases are illustrations of such expressions which have been held not slanderous *per se* as imputing chastity: "Go over to my office. My wife and mother are particular what company they keep. They do not wish to be annoyed by such characters as you." (*McMahon v. Hallock*, 48 Hun, 617, 1 N. Y. Supp. 312, 15 N. Y. St. Rep. 828.) "She is a damned slut, she is a damned bitch,

she is a damned sow, and those who know her know that she is no account." (*Peters v. Garth*, 20 Ky. Law Rep. 1934, 50 S. W. 682.) "A dirty, vile woman." (*Feast v. Auer*, 28 Ky. Law Rep. 794, 90 S. W. 564.) "A woman of ill repute." (*Burke v. Stewart*, 81 Ill. App. 506.) "Dirty slut." (*Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509.) To charge that a woman is "bad" or "very bad" does not impute unchastity. (*Snell v. Snow*, 13 Met. (Mass.) 278, 46 Am. Dec. 730; *Blake v. Smith*, 19 R. I. 476, 34 Atl. 995.) To call a woman a "damned old bitch" does not impute a want of chastity, and is not actionable *per se*. (*Warren v. Ray*, 155 Mich. 91, 130 Am. St. Rep. 566, 16 Ann. Cas. 513, 118 N. W. 741.) "She is a fast girl" is not actionable *per se* as charging unchastity. (*Brinsfield v. Howeth*, 107 Md. 278, 24 L. R. A. (n. s.) 583, 68 Atl. 566.) The same has been held as to the words, "You are only a low woman." (*Kenworthy v. Brown*, 45 Misc. Rep. 292, 92 N. Y. Supp. 34.) To charge a woman with being "indecent" does not of itself amount to a charge of unchastity. (*Schaefer v. Schoenborn*, 101 Minn. 67, 111 N. W. 843.) Even a charge that a woman is not "decent," and "that she keeps a public house as bad as any house of ill fame," does not impute unchastity. (*Dodge v. Lacey*, 2 Ind. 212.) To charge a woman with being "base" and "low" does not impute unchastity. (*Snow v. Witcher*, 31 N. C. 346; see, also, *Jackson v. Ferguson*, 181 Iowa, 1192, 165 N. W. 326; *Walker v. Hoeffner*, 54 Mo. App. 554; *Wimer v. Allbaugh*, 78 Iowa, 79, 16 Am. St. Rep. 422, 42 N. W. 587; *McLaughlin v. Bascom*, 38 Iowa, 660.)

The evidence in the case is insufficient to sustain the verdict and the judgment, for the reason that it does not appear what interpretation the hearers other than the plaintiff put upon the alleged slanderous words, even though it be conceded that the defendant uttered the words as claimed. "It must be shown that the libelous or slanderous matter was communicated to some third person who understood it, since otherwise there is no publication." (25 Cyc. 366; 17 R. C. L., "Libel

and Slander," sec. 56; Newell on Slander and Libel, sec. 244; *Walker v. White*, 192 Mo. App. 13, 178 S. W. 254; *Traylor v. White*, 185 Mo. App. 325, 170 S. W. 412; *Cameron v. Cameron*, 162 Mo. App. 110, 144 S. W. 171.)

Error was committed in refusing to allow defendant to show that he had never been in the habit of using such language as is ascribed to him in the complaint. (Jones on Evidence, 2d ed., sec. 58; 10 R. C. L., sec. 127.)

Mr. E. E. Enterline and *Mr. C. F. Gillette*, for Respondent, submitted a brief; *Mr. Gillette* argued the cause orally.

By our statutes, slander, among other things, is defined as being a false and unprivileged publication other than libel, which imputes to another a want of chastity. (Rev. Codes, sec. 3603.)

The alleged defamatory matter is to be construed as a whole; the words must be taken in connection with other parts of the conversation. (25 Cyc. 357; *Brown v. Independent Pub. Co.*, 48 Mon. 374, 138 Pac. 258; *Sheibley v. Ashton*, 130 Iowa, 195, 106 N. W. 618; *Truman v. Taylor*, 4 Iowa, 424.) The words must be given their plain and natural meaning, and understood by court and jury as other people understand them and not to be construed in their technical sense. (25 Cyc. 355, 357; *Kedrovivansky v. Niebaum*, 70 Cal. 216, 11 Pac. 641.)

It is contended by counsel for appellant that if the words used are ambiguous, or if they are capable of two interpretations, one innocent and the other defamatory, then they cannot be deemed slanderous *per se*. The contention made, as well as other contentions made by him in connection with this branch of the case, are fully answered in the case of *Sheibley v. Ashton*, *supra*.

In none of the cases cited and referred to by counsel for appellant for the purpose of supporting his contention that the words used by the appellant in this case at bar were not slanderous *per se* are the facts set forth so that an intelligent

conclusion can be drawn from the quotations given from the various authorities cited. Nor does it appear whether such states have statutes defining slander similar to ours. We have examined some of them and we find that there are no statutes defining slander and that the courts held, as did this court before the enactment of our statute defining slander, that the words used in slander must impute crime before they are objectionable *per se*. The following is quoted from the opinion in the case of *Schaefer v. Schoenborn*, 101 Minn. 67, 111 N. W. 843, a case cited by counsel for appellant. "Spoken words are not objectionable *per se* unless they charge crime, but it is not necessary that the charge be made in direct terms, for such words are actionable if they would naturally and presumably be understood by those who hear them, as charging a crime." The language used in the above case not imputing crime to the plaintiff was accordingly held not actionable *per se*.

In the light of the authorities heretofore cited, we feel confident that the words used by the appellant concerning the respondent were slanderous *per se*, and that the complaint states a cause of action. The appellant in his plea of justification having placed a construction upon the language used, and in which he charges that the respondent was unchaste and that the language was used in the sense that she was a coarse, vulgar, indecent and unchaste woman (*Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189), ought not now to be heard to say that the language used was not slanderous *per se*, and that therefore the complaint does not state facts sufficient to constitute a cause of action. The plea of justification is inconsistent with the general denial therein, and such plea of justification is an admission of the speaking and publishing of the slanderous words complained of. (*Johnson v. Butte and Superior Copper Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *Prewitt v. Wilson*, 128 Iowa, 198, 103 N. W. 365; *Alderman v. French*, 1 Pick. (Mass.) 1, 11 Am. Dec. 114.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for alleged slander. Plaintiff charges in her complaint that on May 10, 1915, in the presence of herself and other persons, the defendant used to and concerning her the following language: "This is the toughest and commonest thing on the reservation. We won't have this thing around. She's the damnedest, commonest, toughest thing around here. I wouldn't have your damn old homestead [referring to a homestead held by plaintiff and her husband] the next one to me. I'll look for a man and put him on the place of mine [referring to some lands adjoining the homestead held by plaintiff and her husband and occupied by defendant] and tell him what you are." By innuendo it is alleged that by the use of this language defendant intended to convey, and did convey, the meaning that plaintiff was a coarse, indecent and unchaste woman. Defendant denied generally all the allegations of the complaint, and pleaded justification as follows: "That the charged and supposed defamatory words in the complaint set forth were each and all of them true, and that the plaintiff was, on or about the tenth day of May, 1915, an unchaste woman, and was the damnedest, commonest and toughest thing on the reservation, in the sense that she was a coarse, vulgar, indecent and unchaste woman." The trial of the cause resulted in a verdict for plaintiff, and defendant appealed from the judgment and from an order denying a new trial.

Throughout the proceedings the court below ruled that the [1] language set forth in the complaint is slanderous *per se*, and upon these rulings the principal assignments of error are predicated. Special damages are not pleaded, and it follows that, unless the theory adopted by the trial court is correct, the complaint does not state a cause of action. (*Brown v. Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258.)

It is a rule of the law of slander that, if the language used, [2] in and of itself, is not defamatory, but becomes so only

in the light of the circumstances surrounding the utterance, the extrinsic facts disclosing its slanderous character must be pleaded. (*Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509.) There are not any extrinsic facts stated in this complaint, so that the correctness of the trial court's position must be tested by reference to the language itself.

Slander is defined by section 3603, Revised Codes, as follows:

"Slander is a false and unprivileged publication other than libel, which:

"1. Charges any person with crime, or with having been indicted, convicted, or punished for crime.

"2. Imputes in him the present existence of an infectious, contagious, or loathsome disease.

"3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

"4. Imputes to him impotence or want of chastity; or,

"5. Which, by natural consequence, causes actual damage."

There are certain well-defined rules applicable to cases of this character upon which the authorities are generally agreed:

(a) The alleged defamatory matter is to be construed as an [3] entirety and with reference to the remaining portions of the conversation. (*Brown v. Independent Pub. Co.*, above.)

(b) The opprobrious words are to be construed according [4] to their usual, popular and natural meaning and common acceptation, that is, in the sense in which persons out of court and of ordinary intelligence would understand them (25 Cyc. 355), for the presumption is to be indulged that the third party or parties present so understood them.

(c) If the language is not slanderous *per se*, the innuendo [5] cannot make it such. (*Paxton v. Woodward*, 31 Mont.

195, 107 Am. St. Rep. 416, 78 Pac. 215; *Lemmer v. Tribune*, 50 Mont. 559, 148 Pac. 338.)

(d) If the language is susceptible of two meanings, one defamatory and the other not, it is for the jury to determine in what sense it was used. (*D'Autremont v. McDonald*, 56 Mont. 522, 185 Pac. 707.)

In so far as disclosed by the pleadings, the language quoted constituted substantially the entire conversation, and, according to plaintiff's version of the affair, little, if anything, more was said.

Counsel for plaintiff concede, as they must, that the trial court's rulings can be justified only upon the assumption that the language, as it is set forth in the complaint, charges "want of chastity," for it cannot be brought within any other provision of the statute above. Does this language, of itself, impute to plaintiff a want of chastity? That it does not is beyond controversy, and a reference to any standard dictionary is sufficient to demonstrate the correctness of this conclusion. It is not alleged that any or all of the opprobrious epithets had a local meaning or significance which implies want of chastity, and of those epithets only the word "common" has that significance under any circumstances, according to the lexicographers. The term "common," when applied to a woman, may impute want of chastity or not, depending upon the circumstances of its use. In its primary sense it means universal; pertaining equally to two or more; usual, habitual; not distinguished from the majority, as a common soldier; the common people. It means, also, trite; commonplace; low; inferior; vulgar; coarse. (Century Dictionary.)

In the absence of any prefatory allegations disclosing that the language was used in a defamatory sense to denote want of chastity, it is not slanderous *per se*, and the trial court erred in its rulings. (*D'Autremont v. McDonald*, above.) But counsel for plaintiff insist that by his plea of justification defendant has supplied the necessary allegations omitted from

[8] the complaint. Under our very liberal rules of pleading in civil actions, the defendant may interpose as many defenses as he has, even inconsistent defenses, provided only that they are not so far inconsistent that, if one be true, the other must necessarily be false. (*Johnson v. Butte & Superior C. Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *O'Donnell v. City of Butte*, 44 Mont. 97, 119 Pac. 281.)

If defendant had admitted that he used the language set [9] forth in the complaint, the position taken by counsel for plaintiff would be invulnerable; but we see no reason why these defenses may not be interposed without detriment to the defendant. The plea of justification is hypothetical in effect, if not in form, and amounts to no more than this: Defendant denies that he used the language or intended to impute to plaintiff a want of chastity, but, if the jury should find that he employed language which had that effect, he asserts that it was true. There is some analogy, at least, between this defense of justification as pleaded in this instance and the plea of contributory negligence which presupposes the existence of primary negligence. In *Day v. Kelly*, 50 Mont. 306, 146 Pac. 930, and in *Nelson v. Northern Pac. Ry. Co.*, 50 Mont. 516, 148 Pac. 388, we held that a general denial and plea of contributory negligence may be joined, and that the latter plea does not confess the negligence charged in the complaint.

The answer does not supply the allegations omitted from the complaint, and which are necessary to disclose that the language is slanderous. The other assignments need not be considered.

For the reason that the complaint does not state a cause of action, the judgment and order are reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MCLEAN, APPELLANT, v. DICKSON ET AL., RESPONDENTS.

(No. 4,153.)

(Submitted May 29, 1920. Decided June 25, 1920.)

[190 Pac. 924.]

Pleading and Practice—Complaint—Splitting Causes of Action—Remedy.**Pleading and Practice—Splitting Causes of Action—Remedy.**

1. Where plaintiff in her complaint had in one cause of action joined a claim for damages for injury to and conversion of personal property, for alleged slanderous statements concerning her and her business, and for injury to her person by reason of an invasion of the premises occupied by her as tenant, a motion that she be required to separately state and number her causes of action was a proper method of attacking the complaint.

Same—Causes of Action—Motion to Separately State and Number—When Proper.

2. *Held*, that since the complaint above referred to alleged the invasion of more than one primary right and plaintiff could, under proper pleadings, have maintained a separate and independent suit upon any one of them without subjecting herself to the charge that she had split her cause of action, the contention that because all of the acts complained of were done in pursuance of a conspiracy and that therefore but one wrong was committed entitling her to set forth all her allegations in one cause of action, was without merit.

Appeal from District Court, Blaine County; W. B. Rhoades, Judge.

ACTION by Kathryn C. McLean against James L. Dickson and another. A motion to separately state and number causes of action was sustained, and, plaintiff refusing to plead further, judgment of dismissal was entered, from which plaintiff appeals. Affirmed.

Mr. Frank N. Utter, for Appellant, submitted a brief.

The motion ought not to have been sustained on the merits. There is but one cause of action stated, to-wit, a conspiracy to injure and acts done in furtherance thereof, to appellant's damage. (See *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Dewing v. Dewing et al.*, 112 Minn. 316, 127 N. W. 1051; *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98; *Raymond v.*

Sturges, 23 Conn. 134, 145; *Brewer v. Temple*, 15 How. Pr. (N. Y.) 286.) In the case of *Oliver v. Perkins*, 92 Mich. 304, 52 N. W. 609, the court said: "So far as acts done with a common intent and purpose contributed to the same result, they, too, were incapable of severance." In *Bingham v. Lipman*, *supra*, and *Oliver v. Perkins*, *supra*, the facts are so nearly analogous to the facts in the present case that the reasoning in those cases applies very forcibly to the present case.

In the case of *Barron v. Pittsburg Plate Glass Co.*, 10 Ohio S. & C. Pl. Dec. 114, it was held that the averment of a conspiracy makes it possible to unite in one action, and as a single cause of action, claims for damages which would otherwise have to be sought in independent actions. Thus threats, slander of business, unlawful solicitation of customers, *etc.*, may be parts or elements of a charge of conspiracy, for the attempted destruction of plaintiff's business; therefore a motion requiring plaintiff to itemize his damages should be overruled. (8 Cyc. p. 675, note 52; *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373; *Mussina v. Clark*, 17 Abb. Pr. (N. Y.) 188; *Northern Pac. R. Co. v. Kindred*, 14 Fed. 77, 3 McCrary, 627; *Estee on Pleading and Practice*, sec. 1767.)

The gist of an action of this character is not the wrongful confederation, but the damages and the elements which go to make up the cause of action are: (1) A wrongful combining, confederating and conspiring to effectuate a common purpose and design; (2) Acts done in furtherance of such purpose and design; and (3) Resultant injury.

Messrs. Norris & Hurd and *Mr. D. L. Blackstone*, for Respondents, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

"The great weight of authority is that the proper remedy for a failure to state separately is a motion to make the complaint more definite and certain by separately stating the causes of action." This rule is approved by this court in the

case of *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887. (See, also, *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841.)

If two or more causes of action belonging to one class are improperly joined and not separately stated and numbered in the complaint, and the defendant answers without filing a motion requiring the causes of action to be separately stated and numbered, the objection is waived. (5 Ency. Pl. & Pr. 336; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *French v. Deane*, 19 Colo. 504, 24 L. R. A. 387, 36 Pac. 609; *Possell v. Smith*, 39 Colo. 127, 88 Pac. 1064; *Wood v. Anthony*, 9 How. Pr. (N. Y.) 78; *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775; *Waldorf v. Phillips*, 42 Mont. 80, 111 Pac. 546.)

Appellant has united injuries to character, person and property, and beyond question the complaint is subject to demurrer for that reason. Appellant has, however, further transgressed the provisions of section 6533, Revised Codes, in that she has united two or more causes of action for injuries to character, two or more causes of action for injuries to person, and two or more causes of action for injuries to property.

The basis and gist of an action for conspiracy are the damages occasioned by the wrongful act of one or more persons, and that the only materiality of the allegations with respect to the conspiracy or combination of those who are not the direct actors is to connect them with and make them responsible for the acts of the others. (*Cohen v. Nathaniel Fisher & Co.*, 135 App. Div. 238, 120 N. Y. Supp. 546; *Bowman v. Wohlke*, 166 Cal. 121, Ann. Cas. 1915C, 1011, 135 Pac. 37; *Perry v. Hayes*, 215 Mass. 296, 102 N. E. 318; *Harbison v. White*, 56 Okl. 566, 156 Pac. 335; *Hundley v. Louisville & N. R. Co.*, 105 Ky. 162, 88 Am. St. Rep. 298, 63 L. R. A. 289, 48 S. W. 429; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.) From the foregoing authorities it clearly appears that the charging of a conspiracy does not change the nature of the action or eliminate the necessity of making averments in a

complaint the same as in ordinary actions. (12 C. J. 584, 585; *Howland v. Corn*, 232 Fed. 35, 146 C. C. A. 227; *Medlin Milling Co. v. Moffatt Commission Co.*, 218 Fed. 686; *May v. Wood*, 172 Mass. 11, 51 N. E. 191; *Benedict v. Thain*, 150 App. Div. 137, 134 N. Y. Supp. 720.)

In 12 C. J. 630, the statement is made that on the trial, the allegation relative to conspiracy "may be wholly disregarded and a recovery had irrespective of such allegations." This rule is supported by the following cases: *Howland v. Corn*, *supra*; *Harbison v. White*, *supra*; *Dickson v. Lights* (Tex. Civ.), 170 S. W. 834; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Kujek v. Goldman*, 9 Misc. Rep. 34, 29 N. Y. Supp. 294.

No averment of a conspiracy is necessary to entitle a party to offer proof connecting a defendant with a wrongful act. (12 C. J. 630; *Butler v. Duke*, 39 Misc. Rep. 235, 79 N. Y. Supp. 419; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *City of Boston v. Simmons*, 150 Mass. 461, 15 Am. St. Rep. 230, 6 L. R. A. 629, 23 N. E. 210; *Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44; *Herron v. Hughes*, 25 Cal. 555.)

Where there is a charge in a complaint of a conspiracy against two or more parties and the proof fails to show such conspiracy, recovery may however, be had against one of the parties shown to be guilty of wrongdoing. (12 C. J. 85; *Dickson v. Lights*, *supra*; *Jolly v. Doolittle*, 169 Iowa, 658, 149 N. W. 890; *Keit v. Wyman et al.*, 67 Hun, 337, 22 N. Y. Supp. 133; *James v. Evans*, 149 Fed. 136, 80 C. C. A. 240.)

No logical reason occurs to us why the rule relative to a motion to make a complaint more definitely certain by a separate statement and numbering of the cause of action contained therein is any different from that relative to a motion for a judgment on the pleadings. A motion for a judgment on the pleadings is in the nature of both a motion and a demurrer, and may be considered either as a motion or a demurrer. (*Floyd v. Johnson*, 17 Mont. 469, 4 Pac. 631; *Power v. Gum*, 6 Mont. 5, 9 Pac. 575; *Taylor v. Palmer*, 31 Cal. 240;

Bergerow v. Parker, 4 Cal. App. 169, 87 Pac. 248; 31 Cyc. 606.) Applying this rule to the motion in the case at bar, it may be considered either as a motion or a demurrer or in the nature of either. This court has decided, as heretofore referred to, in the case of *Galvin v. O'Gorman*, *supra*, that a motion for an order requiring a party separately to state and number causes of action is in effect a motion to make a pleading more definite and certain. At common law and under the Codes of many of the states the defect of indefiniteness and uncertainty in a pleading is reached by special demurrer only, and a motion to make a pleading more definite and certain is a substitute for the special demurrer at common law. Our practice has not so far departed from the common-law practice in this respect as to draw any definite distinction between a motion or a demurrer under the circumstances here presented. In the case of *Prindle v. Caruthers*, 15 N. Y. 425, the court of appeals of that state holds that the remedy by motion to make a pleading more definite and certain has taken the place of demurrers for want of form.

From the foregoing it appears that the line of distinction between motions and demurrers having reference to defects in the form or sufficiency of pleadings has at no time been clearly drawn or easily distinguishable, and they are so closely related in substance that a motion may be considered as a demurrer, or a demurrer as a motion when necessary for any given purpose.

MR. JUSTICE HURLY delivered the opinion of the court.

Plaintiff, for complaint, alleged that she was in the actual use and occupation of certain rooms located in Chinook, and entitled to certain privileges connected with her tenancy, and that she occupied said rooms as a place of abode and for the carrying on of her means of livelihood as a hairdresser and manicurist; that the defendants, "conspiring together and acting wrongfully and maliciously," did and committed certain acts by which they harassed, annoyed and vexed plaintiff in

the use and enjoyment of said premises, in that: (a) The defendant Jacob Dickson repeatedly attempted to force entrance into said premises, and at other times did wrongfully enter therein without her consent; (b) that defendants locked and barred the doors leading out of plaintiff's premises; deprived her of the use of lighting facilities and of the bath and toilet accessories appurtenant thereto; (c) that defendants maliciously uttered and caused to be circulated false and defamatory statements concerning plaintiff, and concerning her occupation as aforesaid; (d) did wrongfully and maliciously urge and solicit persons intending to engage plaintiff's services as a manicurist and hairdresser not to so engage her, whereby plaintiff suffered loss of business; (e) did falsely charge plaintiff with having committed crimes and thereby, without probable cause, induced police officers to seek entrance into said premises in the night-time, and to threaten plaintiff with arrest, by reason of which plaintiff suffered mental distress and suffering; (f) that, in the absence of plaintiff, defendants entered said premises without her consent, and fastened and barred the doors thereof, whereby plaintiff was compelled to seek refuge elsewhere; (g) that defendants wrongfully and maliciously seized and detained wearing apparel and personal belongings of plaintiff and her goods and accessories used in her said occupation, all of the value of approximately \$1,500. It is further alleged that by reason of such acts, plaintiff has been damaged in the sum of \$5,000. She demanded judgment: First for \$5,000; and, second, for punitive damages in the sum of \$15,000.

All of the foregoing, with the exception of the formal allegation as to plaintiff's occupancy of the premises, is set forth in one paragraph, as one cause of action.

The defendants served and filed a motion demanding that [1] plaintiff be compelled to "separately state and number the causes of action united in one cause of action," upon different grounds, asserting in effect that the complaint sets forth causes of action for damages based upon the following:

(1) Eviction; (2) unlawful interference with her occupation; (3) acts of defendant James L. Dickson, to which the other defendant was not a party; (4, 5) deprivation of use of bathroom and lights; (6) defamatory statements; (7) defamatory statements derogatory to plaintiff's business; (8) urging plaintiff's clients to refrain from dealing with her; (9) entrance of police officers to her apartment; (10) barring doors of the apartment; (11) conversion of her property. This motion was sustained, and, the plaintiff refusing to plead further, judgment of dismissal was entered, from which this appeal was taken.

It is urged by plaintiff that a motion was not defendant's proper remedy, and that defendants should have demurred, and the decision of this court in *Bandmann v. Davis*, 23 Mont. 382, 59 Pac. 856, is cited in support of her position. An examination of the opinion in that case, however, shows that the point raised on this appeal was not under consideration. There the defendant at the trial objected to the introduction of evidence because one of the causes of action arose *ex delicto*, whereas the other arose *ex contractu*, and was not separately stated and numbered. The court said: "A motion to exclude evidence, or an objection to receiving it, is not the remedy for the intermingling in one count of several causes of action; nor is there remedy other than demurrer, by which the complaint may be attacked upon the ground that causes of action are improperly united therein."

It is clear that under the pleadings in the foregoing case, if the defendant wished to urge the objection that two separate and distinct causes of action had been united in one complaint, under section 6534, Revised Codes, a demurrer, and not a motion to separately state and number, was the proper remedy.

In *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887, where three separate causes of action were stated in one count, and no objection to the form of the complaint was made until plaintiff had rested upon the trial, the court held: "The

proper practice in such a case is outlined in 5 Encyclopedia of Pleading and Practice, 336, where it is said: 'The clear weight of authority, however, is that the proper remedy for a failure to state separately is a motion to make the complaint more definite and certain by separately stating the causes of action.' This same rule is stated in Pomeroy's Code Remedies (4th ed.), section 341 (*section 447), and is approved in *City Carpet Beating etc. Works v. Jones*, 102 Cal. 506, 36 Pac. 841."

In *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775, a defendant, who had moved to have the plaintiff separately state and number certain alleged causes of action, was held to have waived the right to object upon the appeal that the complaint was indefinite and uncertain, for the reason that objection had not been made upon that ground.

While there is a distinction between a demurrer and a motion, a motion to require causes of action to be separately stated and numbered has many, if not all, of the elements of a special demurrer. It has been held in this jurisdiction to be an abuse of discretion to refuse to allow a plaintiff to reply after the overruling of a motion made by the plaintiff, directed against the answer, the court there holding that a motion for judgment on the pleadings in some respects is merely a demurrer. (*Floyd v. Johnson*, 17 Mont. 469, 43 Pac. 631.)

A motion, therefore, to require plaintiff to separately state and number her causes of action was a proper method of attacking the complaint. (See, also, *Cohen v. Clark*, *supra*.)

It is next contended that because all of the acts of the defendants were in pursuance of a conspiracy against the plaintiff, but one wrong was committed; hence plaintiff could properly set forth all the allegations of her complaint in one cause of action.

Section 6533 of our statute makes provision for the inclusion in one action of certain causes of action, and then provides: "The causes of action so united must all appear on the face of the complaint, to belong to one only of these classes, and must affect all the parties to the action, and not require dif-

ferent places of trial, and must be separately stated and numbered; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

In this action plaintiff seeks to recover, among other things, damages for statements in the nature of slander, alleged to have injuriously affected her business and reputation; injury to and conversion of her property, and injury to her person by reason of the entry of her premises by the defendants.

This court, in *Cohen v. Clark*, *supra*, said: "Several breaches of a single contract may constitute but one cause of action, and if the several acts pleaded do make up but a single cause of action, one count in the complaint is sufficient to state them. Under equally well-recognized rules of pleading, a plaintiff is prohibited from splitting a single cause of action. * * * But just what constitutes a single cause of action is frequently difficult to determine. At common law the question was easily settled, for the form of the action determined its character. Under the Codes, forms of action are abolished and the facts constituting plaintiff's complaint must be stated, and the construction put upon a pleading must now determine whether it states one cause of action only or more than one. 'A cause of action is the right which a party has to institute a judicial proceeding,' * * * and consists of a union of the plaintiff's primary right and an infringement of it by the defendant. * * * Manifestly, then, if plaintiff pleads several contracts and a breach of each, he states several causes of action; but if he pleads but a single contract and a breach of it in one or more particulars, he states but a single cause of action, and it is immaterial how the complaint is paragraphed."

The rule as laid down by Mr. Pomeroy in his work on Code Pleading (4th ed.), section 350, is as follows: "If the facts alleged in the pleading show that the plaintiff is possessed of two or more distinct and separate primary rights, each of which has been invaded, or that the defendant has committed

two or more distinct and separate wrongs, it follows inevitably • • • that the plaintiff has united two or more causes of action, although the remedial rights arising from each, and the corresponding reliefs, may be exactly of the same kind and nature. If two separate and distinct primary rights could be invaded by one and the same wrong, or if the single primary right should be invaded by two distinct and separate legal wrongs, in either case two causes of action would result; *a fortiori* must this be so when the two primary rights are each broken by a separate and distinct wrong."

The supreme court of Wisconsin in the case of *Herman v. Felthousen*, 114 Wis. 423, 90 N. W. 432, said: "The test to be applied in order to determine whether a complaint states more than one cause of action is whether, looking at the whole pleading, there is more than one primary right presented thereby for vindication. There may be many minor subjects, and facts may be stated constituting independent grounds for relief, either as between the plaintiff and all the defendants, or the former and one of the latter, or between defendants, and there be still but a single primary purpose of the suit, with which all the other matters are so connected as to be reasonably considered germane thereto—parts of one entire subject, presenting to the court but one primary ground for invoking its jurisdiction. That was the rule before the Code, and it was preserved thereby in unmistakable language, as this court has said on many occasions." (See *Level Land Co. v. Sivyer*, 112 Wis. 442, 88 N. W. 317.)

And in *Adkins v. Loucke*, 107 Wis. 587, 83 N. W. 934, the court said: "The infallible test by which to determine whether a complaint states more than one cause of action is, Does it present more than one subject of action or primary right for adjudication? • • • If it stand that test, no matter how many incidental matters may be connected with the primary right, rendering other parties than the main defendant proper or necessary to the litigation for a complete settlement of the controversy as to plaintiff, or for the due protection of their

rights as against him or between themselves, there is yet but one cause of action, and a demurrer upon the ground of the improper joinder of causes of action will not lie."

Manifestly, in this case, the plaintiff alleges the invasion of more than one primary right. She asserts claims upon any one of which, under proper pleadings, she would be able to maintain her suit. Had she brought separate actions for the injury or conversion of her personal property, for the alleged defamatory words, or the invasion of her premises, her pleadings could not be successfully attacked because she had "split" the cause of action. Each cause, if proven, would establish the invasion of a primary right, each independent of the others.

It is apparent that plaintiff has failed to distinguish between the separate statement and numbering of different causes of action and a demurrer to a complaint because causes of action have been improperly united in the complaint.

The district court was not in error in directing that the plaintiff be required to separately state and number her causes of action. The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

SANBORN CO., RESPONDENT, v. POWERS, APPELLANT.

(No. 4,150.)

(Submitted May 29, 1920. Decided June 25, 1920.)

[190 Pac. 990.]

Partnership—Evidence—Sufficiency—Withdrawal of Evidence from Jury—Curing Error—Settlement of Instructions—Appeal.**Partnership—Evidence—Withdrawal from Jury—Curing Error.**

1. Where in an action against alleged copartners, the answering defendant denied the partnership, error in admitting testimony of the reputation of the defendants as copartners on the statement of counsel for plaintiff that he would bring knowledge of the alleged reputation home to the answering defendant, which condition remained unfulfilled, was cured by striking the testimony from the record with an admonition to the jury not to consider it in arriving at their verdict.

Instructions—Failure to Object at Settlement—Appeal.

2. Unless an objection is interposed to an instruction at the time the instructions are settled, error cannot be predicated on the action of the court in giving it.

Partnership—Evidence—Sufficiency.

3. Evidence examined and *held* sufficient to establish a partnership within the meaning of sections 5466 and 5467, Revised Codes.

Appeal and Error—Conflict in Evidence—Judgment Conclusive.

4. Where a substantial conflict exists in the evidence, the supreme court on appeal will not reverse the judgment attacked on the ground of insufficiency of the evidence to sustain it.

'Appeal from District Court, Gallatin County; Ben B. Law, Judge.

ACTION by the Sanborn Company against G. R. Powers and another, copartners as Powers & Black. From a judgment for plaintiff, and an order denying a new trial, the named defendant appeals. Affirmed.

Mr. W. S. Stephenson and Mr. Geo. Y. Patten, for Appellant, submitted a brief; Mr. Patten argued the cause orally.

The cases of *Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791, *Croft v. Bain*, 49 Mont. 484, 143 Pac. 960, *Flathead County State Bank v. Ingham*, 51 Mont. 438, 153 Pac. 1005, *Hanrahan v. Freeman*, 35 Mont. 584, 90 Pac. 793, and *St. Paul Ma-*

chinery Mfg. Co. v. Bruce, 54 Mont. 549, 172 Pac. 330, establish the following principles as the law of Montana relating to actual partnerships: An actual partnership can only be formed by the consent of the parties, and with the intent on their part, either express or implied, to form a partnership; the mere sharing of profits does not establish such relation; to constitute an actual partnership, each partner must, as an indispensable element, assume toward the other the interchangeable relation of principal and agent; and there must be such a community of interest as empowers each partner to make contracts, incur liability, and dispose of the property. The testimony in this case fails to meet any of these tests.

The testimony fails to show that Powers held Black out as a partner, and that on the faith of such a representation the plaintiff gave credit to Black. Actual partnership and ostensible partnership are entirely separate and distinct, and proof of one is not proof of the other. Section 5491 of the Revised Codes of Montana provides: "Anyone, permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, and who on the faith thereof give credit to the partnership." This is the section of the Codes under which liability must attach to Powers in this case on the theory of ostensible partnership, if he is to be charged with liability at all. This statute is merely a statutory declaration of the doctrine of estoppel *in pais* as applied to partnership. (*Thompson v. First Nat. Bank*, 111 U. S. 529, 28 L. Ed. 57, 4 Sup. Ct. Rep. 689 [see, also, Rose's U. S. Notes]; *Nofsinger v. Goldman*, 122 Cal. 609, 614, 55 Pac. 425.)

Under the very terms of the statute, as in all cases of estoppel, it is indispensably necessary that the person who extended the credit be shown to have relied on the representation. (30 Cyc. 394; *In re McDonald's Estate*, 167 Iowa, 582, 149 N. W. 897.) Moreover, "acts done or knowledge acquired subsequent to the transaction out of which the estoppel is claimed to arise can have no bearing on the question. The

representations or conduct relied on to raise the estoppel must have been concurrent with or anterior to the action which they are alleged to have influenced." (16 Cyc. 741.)

Mr. E. A. Peterson and *Mr. C. E. Carlson*, for Respondent, submitted a brief; *Mr. J. A. Walsh*, of Counsel, and *Mr. Carlson* argued the cause orally.

While some courts still cling to the rule that a sharing of profits establishes a partnership, the weight of modern authority seems to be that the sharing of profits is evidence of the partnership. (*Cudahy Packing Co. v. Hibou*, 92 Miss. 234, 18 L. R. A. (n. s.) 975, note p. 992, 46 South. 73; 20 R. C. L. 285; *Parchen v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588.) It has also been held that a sharing of profits raises a presumption of partnership. (30 Cyc. 369.) The conclusion to be reached, at least so far as our own court is concerned, is that the sharing of profits is evidence that a partnership has been formed. (*Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791.)

There is a distinction between a partnership *inter sese* and a partnership where the rights of creditors are concerned. It has been repeatedly held by the courts that where the rights of third parties are concerned, the construction of the agreement is the determining factor as to whether or not a partnership existed, regardless of the intention of the parties. Indeed, it has been held that an agreement was a partnership agreement, even though it contained a stipulation that the parties were not to be partners, or that they were not to be liable for the debts of each other, and that he who invests money in another's business, bargains for a share of its profits, claims an interest in it, and participates in its management, makes himself a partner in it notwithstanding he stipulates that his associate shall alone be responsible for its debts. (*Roberts v. C. W. Adams & Son Co.*, 33 Ky. Law Rep. 207, 110 S. W. 314; *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785; *McDonald v. Campbell*, 96 Minn. 87, 104

N. W. 760.) In this respect, we invite the attention of the court to the citations found in the note in 18 L. R. A. (n. s.) 986.

If two persons agree to engage in the prosecution of a lawful business, each to furnish part of the capital stock and his services, and both to share in the profits and losses, they become partners. (*Kingsbury v. Tharp*, 61 Mich. 216, 28 N. W. 74.) He who participates in the management and control of a business while receiving a part of its profits is generally assumed to be a partner. (*Johnson Bros. v. Carter & Co.*, 120 Iowa, 355, 94 N. W. 850.) "While the burden of proving a partnership rests upon a plaintiff, who sues defendants as partners, the partnership relation or liability being denied by any of defendants, he is not bound to do more than make out a *prima facie* case against them. The burden is then cast upon them of showing that there is no partnership and that they have not held themselves out as partners." (30 Cyc. 403.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The plaintiff brought this action on an open account for goods, wares and merchandise alleged to have been sold and delivered to the defendants as copartners. Defendant Black failed to enter his appearance, and his default was duly entered. Powers answered, denying generally all the allegations of the complaint. On the trial he did not dispute the correctness of the account, but contended that no partnership agreement existed between himself and Black, and that Black alone was liable to plaintiff. The jury found in favor of plaintiff. From the judgment on the verdict, and an order denying his motion for a new trial, this appeal is prosecuted.

The first eight assignments of error are predicated on the admission of evidence of the reputation of Powers and Black as copartners in the community in which they operated as wheat growers; the remaining assignments, on the alleged in-

sufficiency of the evidence to establish an actual partnership. [1] It is contended that the admission of the evidence of reputation constituted a material variance from the allegations of the existence of an actual partnership.

1. While this might be true, the testimony objected to was admitted only provisionally on the statement of counsel that he would bring knowledge of the alleged reputation home to Powers. It was later admitted that this had not been done, and all of the evidence was by the court stricken from the record, and the court thereupon orally admonished the jurors not to consider such evidence in any way in arriving at their verdict, explaining to them the reason for striking it from the record. It is conceded that, under the general rule, this was sufficient to take the matter from the jury, but counsel contends that an exception is recognized "where the testimony so permeates the record that its exclusion cannot be said to fairly remove the impression which must have been created by it," citing 38 Cyc. 1443. The exception noted in Cyc., however, is: "Where the evidence is so *impressive* that, in the opinion of the appellate court, its effect is not removed from the minds of the jury by its subsequent withdrawal, or by an instruction of the court to disregard it."

The testimony consists mainly of impressions, evidently gained largely from the conduct of Black alone; it was admitted only on the assurance of counsel that it would be connected up, and the court at the outset, in overruling counsel's objections, stated: "He [Powers] might be held out as a partner without his knowledge, no matter what the reputation is there; if Mr. Powers had no knowledge of it, he is not bound by it; it must be connected with some act or knowledge of his." The jurors are presumed to be reasonable men, and, hearing the evidence complained of with this declaration of the court in mind, followed, at the close of the testimony, by the order of the court striking the entire matter from the record, must have clearly understood that they were not to consider the evidence in any manner in arriving at their verdict.

We are therefore of the opinion that the action of the court comes within the general rule stated, and not within the exception thereto.

Some complaint is made that the court instructed the jury [2] on the subject of ostensible partnerships, but no objection was interposed on the settlement of the instructions, and no error is, nor could be, predicated on this ground. (Rev. Codes, sec. 6746; *Stokes v. Long*, 52 Mont. 470, 159 Pac. 28; *Allen v. Bear Creek Coal Co.*, 43 Mont. 269, 115 Pac. 673; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439.)

2. Appellant contends that the evidence is insufficient to [3] warrant a verdict requiring a determination that an actual partnership existed.

Black, called as a witness for the plaintiff, testified in effect that, in the year 1915, he leased a certain section 9 from Powers; that Powers had control of the adjoining sections 15 and 21, belonging to one Wilson; that Powers suggested that they borrow the money necessary to crop these sections, from Wilson, Black to do the work and Powers to pay one-half of the value thereof, and they each to pay one-half of the expense for supplies, seed, labor, etc.; that they give Wilson, for the use of the land, one-fifth of the crop; and that they then divide the profits or share equally in the losses. He further testified that they mutually agreed to the arrangement, gave their joint note to Wilson, and deposited the proceeds in the name of Powers, and thereafter he (Black) paid the running expenses by checks on this account, signed "G. R. Powers, by J. W. Black." He further testified that when the wheat was threshed he hauled it to the elevator, and by the direction of Powers deposited it in the name of "Powers and Black," and thereafter it was taken out and disposed of by Powers. While Powers held a mortgage on Black's interest in the grain, he did not follow the procedure for foreclosing a mortgage, but disposed of the grain as partnership property, and Black testified that the mortgage was given solely at the suggestion of

Powers, to protect Black's interest from seizure by his creditors.

One Brandley testified that he sold two binders to Powers on an open account for use in harvesting the grain, and that, at the time, Powers told the witness that he and Black were partners, but that he wanted to get rid of Black.

Plaintiff's credit man related a conversation over the telephone, in which he advised Powers that Black was purchasing goods of plaintiff; that they were charged to "Powers and Black"; he stated, "I asked him if it was all right, and he said it was all right." The witness further testified that, after the account sued on was due and payable, he requested payment from Powers, who raised no objection to the bill, but stated that he would take it up with Black, and that Powers made no objection to payment until after the account was placed in the hands of an attorney.

While the evidence canvassed above is not entirely satisfactory, it is sufficient, if believed, to establish a partnership in this jurisdiction. It tends to establish "the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them" (Rev. Codes, sec. 5466), "by the consent of all the parties thereto" (sec. 5467); a "partnership business, the funds for investment partnership funds, the property purchased partnership property; and the profits if any, partnership profits" (*Beasley v. Berry*, 33 Mont. 477, 84 Pac. 791). There was "such a community of interest as empowers each party to make contracts, incur liabilities, and dispose of the property." (*Weiss v. Hamilton*, 40 Mont. 99, 105 Pac. 74.) It was a business venture for profit. (*Croft v. Bain*, 49 Mont. 484, 143 Pac. 960.) It tends to establish "the interchangeable relation of principal and agent, which is indispensably necessary to constitute a co-partnership" (*Parchen v. Anderson*, 5 Mont. 438, 51 Am. Rep. 65, 5 Pac. 588), and that there was an agreement not only to share profits, if any, but losses as well.

True, Powers denied each of the statements made; but it was for the jury to determine which version they would accept, and the rule that, where there is a substantial conflict in the evidence, the supreme court, on appeal, will not reverse the judgment of the trial court on the ground of alleged insufficiency of the evidence is too well settled in this state to require the citation of authorities.

The judgment and order of the district court are affirmed.
Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MONTANA LIVESTOCK & LOAN CO., RESPONDENT, v.
STEWART, APPELLANT.

(No. 4,163.)

(Submitted June 2, 1920. Decided June 25, 1920.)

[190 Pac. 985.]

*Contracts of Sale—Breach—Measure of Damages—Evidence—
Banks and Banking —Checks — Dishonor — Instructions —
Harmless Error.*

Contracts of Sale—Breach—Measure of Damages.

1. The measure of damages for breach of a contract to sell livestock was the difference between the contract price and their reasonable market value at the time and place of delivery.

Same—Erroneous Admission of Testimony—Harmless Error.

2. Where the trial court correctly instructed the jury on the measure of damages as above, error in admitting testimony that the stock had been sold at a figure representing an advance over the contract price was harmless, the witness stating in addition that the reasonable market price of the animals at place of destination was the amount realized on resale.

Same—Banks and Banking—Checks—Varying Terms of Writings.

3. After a check given in part payment is accepted, it supersedes oral negotiations of the parties to the contract with reference to the payment, and testimony of purported statements concerning it by the maker either before or after its return by the bank to which it was presented for payment but upon which it was not drawn was inadmissible as an attempt to vary the terms of a written instrument.

Appeal and Error—Admission of Immaterial Evidence—Effect on Judgment.

4. Admission of concededly immaterial evidence is not sufficient to justify reversal of a judgment; such result following only for error materially affecting the appellant's rights on the merits of the case.

Contracts of Sale—Banks and Banking—Checks—What Constitutes Dishonor.

5. Inquiry by telephone of a bank upon which the buyer of livestock had drawn a check in part payment, whether it would guarantee the check and the bank's refusal, coupled with a statement by the cashier of his opinion that it would be paid when presented, did not amount to a dishonor of the check nor justify the seller in his refusal to carry out the contract, since a check can only be dishonored by presentment either directly to the bank on which it is drawn or through another bank in which it is deposited for collection.

Same—Checks—Dishonor—Correct Instruction.

6. An instruction that a contract of sale could not be avoided or rescinded for nonpayment of a check given in part payment without presentment of the check to the bank on which it was drawn and refusal of payment was not open to the objection that it advised the jury that the check must be presented to the bank in person.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

ACTION by the Montana Livestock & Loan Company against William Stewart. From a judgment for plaintiff, and an order denying his motion for new trial, defendant appeals. Affirmed.

Mr. E. E. Enterline and Mr. J. W. Snellbacher, for Appellant, submitted a brief; Mr. Snellbacher argued the cause orally.

Taking a check or draft which is dishonored and proves to be worthless does not amount to payment. Nor according to the weight of authority does it constitute a waiver of cash payment so as to pass title to a vendee which he can pass to a stranger, even though the latter is a *bona fide* purchaser or the like. (Elliott on Contracts, sec. 5040; *McIver v. Williamson-Halsell-Frasier Co.*, 19 Okl. 454, 13 L. R. A. (n. s.) 696, 92 Pac. 170; *Johnson v. Iankovetz*, 57 Or. 24, 29 L. R. A. (n. s.) 709, 102 Pac. 799, 110 Pac. 398.) And this court in the case of *Pasha v. Bohart*, 45 Mont. 76, Ann. Cas. 1913C, 1250, 122 Pac. 284, held that where personal property was sold upon

condition that the purchaser should execute and deliver to the seller a bankable note and the purchaser took possession of the goods and failed to execute and deliver such note, the seller had a right to treat the sale as a cash transaction and sue for the purchase price. In the case of *Johnson v. Iankovetz, supra*, the evidence tended to establish that the sale of personal property was a cash sale. The buyer gave a check. It developed that the check so given was worthless because the maker had no funds in the bank upon which it was drawn. After making the purchase and taking possession of the goods, the purchaser sold them to another and the seller brought an action of replevin against the last purchaser. The court sustained the action upon the ground that title to the goods had never passed between the parties to the first transaction.

It would seem that where it is understood that the sale is to be a cash transaction, then the vendor of personal property should have the right to prove that a check taken as part payment of the purchase price of goods was received by him upon an understanding and agreement that the same could be cashed at a certain bank whenever presented by such vendor.

Messrs. Johnston & Coleman, for Respondent, submitted a brief; *Mr. H. J. Coleman* argued the cause orally.

Having accepted the check, it was incumbent upon Stewart to present it for payment at the bank upon which it was drawn. Having failed to do this, his further acts in repudiating the contract were without justification. "It is an elementary principle that the holder of the check upon a bank has no recourse upon the drawer until he has presented it to the bank upon which it was drawn and payment has been refused." (5 R. C. L., par. 68.) "While, in the absence of agreement, a check received for a debt is merely conditional payment, its acceptance implies an undertaking of due diligence in presenting it for payment." (5 R. C. L., sec. 25; *Manitoba Mortgage & Inv. Co. v. Weiss*, 18 S. D. 459, 112 Am. St. Rep. 799, 5 Ann. Cas. 868, 101 N. W. 37; *Noble v. Dough-*

ten, 72 Kan. 336, 3 L. R. A. (n. s.) 1167, 83 Pac. 1048; *Watt v. Gans*, 114 Ala. 264, 62 Am. St. Rep. 99, 21 South. 1011; *Kennedy v. Jones*, 140 Ga. 302, Ann. Cas. 1914D, 355, 78 S. E. 1069; *First Nat. Bk. v. Currie*, 147 Mich. 72, 118 Am. St. Rep. 537, 11 Ann. Cas. 241, 9 L. R. A. (n. s.) 698, 110 N. W. 499.)

A check is payment until dishonored. (*National Park Bank v. Levy*, 17 R. I. 746, 19 L. R. A. 475, 24 Atl. 777; *Parker-Fain Grocery Co. v. Orr*, 1 Ga. App. 628, 57 S. E. 1074.)

We therefore contend that, having accepted the check drawn upon the Bank of Montana, defendant was bound to present the same for payment at that bank; that until the same had been presented there for payment and been dishonored he had no justification in refusing to complete the contract; that any oral statements which may have been made at the time of the giving and acceptance of this check, which tended to contradict the statement contained in the check as to the place of payment, were properly excluded by the court. (*Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Specht v. Howard*, 16 Wall. 564, 21 L. Ed. 348 [see, also, Rose's U. S. Notes]; *Shirts v. Rooker*, 21 Ind. App. 420, 52 N. E. 629; *Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019; *Fisher v. Briscoe*, 10 Mont. 124, 25 Pac. 30; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495, 22 Am. St. Rep. 742, 48 N. W. 326; *Simonton v. Shaw*, 246 Fed. 683, 158 C. C. A. 639; *Brown v. Spofford*, 95 U. S. 474, 480, 24 L. Ed. 508, 509 [see, also, Rose's U. S. Notes]; *McKenney v. Ellsworth*, 165 Cal. 326, 132 Pac. 75; Parson on Bills & Notes, sec. 521.)

Under the authorities, presentment can only be made by an actual exhibition of the check, and a demand for the payment thereof at the place upon which it is drawn. Undoubtedly the telephone occupies an important place in the commercial and social life of to-day, but under the authorities, presentment for payment of a check cannot be accomplished by its use. (*Gilpin v. Savage*, 201 N. Y. 167, Ann. Cas. 1912A, 861, 34 L. R. A. (n. s.) 417, 94 N. E. 656.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This action was brought to recover damages for the alleged breach of a contract of sale of certain sheep, and resulted in a judgment for the plaintiff. The defendant appeals from the judgment and from the order of the court denying his motion for a new trial.

The controversy between the plaintiff and defendant arose over a check given defendant by one McCain, as agent of the plaintiff, at the time of making the contract, as part payment on the sheep. The check was drawn on the Bank of Montana, of Billings. It was taken by defendant to the Custer State Bank, where the cashier refused to cash the check, as he stated, "without knowing something about it." According to the testimony of defendant, he then had the cashier call up the cashier of the Billings bank and inquire whether the bank would *guarantee* the payment of the check. On being informed that the bank would not do so, defendant returned the check, and notified the plaintiff that he would not deliver the sheep.

The brief of defendant contains thirty-four specifications of error, grouped in argument under eight heads.

I, Specifications 1, 2, 8, 9, 10, 11 and 12 go to the admission of evidence concerning the sale of the sheep mentioned in the contract, to outside parties immediately after the contract [1, 2] was entered into, at \$6 per head, or an advance of thirty-five cents per head over the contract price.

The measure of damages in this case was, of course, the difference between the contract price and the reasonable market value of the sheep at the time and place of delivery, and it is possible that, standing alone, the admission of such evidence would constitute reversible error. However, each of the witnesses, in addition to testifying to the contract price on resale, testified that the reasonable market value of the sheep at Custer was \$6 per head, and this evidence of the market value was corroborated by other evidence. The effect of the testi-

mony complained of was therefore that they agreed to pay the reasonable market price for the animals for which they bargained. (*Lehrkind v. McDonnell*, 51 Mont. 343, 153 Pac. 1012.) The court thereafter correctly instructed the jury as to the measure of damages, and, as this court said in the case of *Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203: "This instruction excluded from the consideration of the jury all other evidence as to the value of these animals. Therefore it is unnecessary to express an opinion as to the propriety of the ruling."

While the admission of such testimony constituted error, it could not have affected the substantial rights of the defendant, and will therefore be disregarded. (Sec. 7118, Rev. Codes; *Church v. Zywert*, ante, p. 102, 190 Pac. 291.)

II. Specifications 3, 4, 13, 14, 15, 16, 21 and 24 are predicted upon the exclusion, on cross-examination of McCain, of purported statements concerning the check, made before and after its return. Such testimony was clearly either incompetent or immaterial or an attempt to vary the terms of a written instrument, and the court's action in excluding it was proper. Whatever the agreement of the parties as to a cash payment down, the check, when accepted, superseded such negotiations, and was "payment until dishonored." (Morse on Banks & Banking, sec. 545.) The case of *Pasha v. Bohart*, 45 Mont. 76, Ann. Cas. 1913C, 1250, 122 Pac. 284, is not in point.

III. In specifications 5, 6, 7, 19 and 20, defendant complains of the admission of what counsel denominates "immaterial evidence" as to what directions were given by plaintiff to its bank concerning the payment of the check. Counsel, thus admitting the immateriality of the evidence, fails to specify in what particular its admission is prejudicial to the rights of the defendant, and a careful reading of the evidence fails to disclose wherein such testimony could have prejudiced the defendant's rights. "An appellate court will not reverse a judgment merely because the lower court erred;

it is only when the error has materially affected the appellant's rights on the merits of the case." (*Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191; *State ex rel. Kohl v. District Court*, 46 Mont. 348, 128 Pac. 582; *Way v. Sherman*, 30 Mont. 410, 76 Pac. 942.)

IV. It is contended that the action of the Billings bank [5] amounted to the dishonor of the check, and justified the defendant in his refusal to deliver the sheep under the contract. Defendant proceeds on the theory that the Billings bank had refused to honor the check, and relies on *Jenderson v. Hansen*, 50 Mont. 216, 146 Pac. 473, where it was held that inquiry of the bank as to whether the buyer had funds therein sufficient to meet it could be made in person or by telephone, or through another, and that evidence of a negative answer over the telephone was admissible. However, the facts before us do not bring this case within the rule laid down. According to the testimony of defendant himself, the inquiry was as to whether the bank would "guarantee" the payment of the check. This is entirely different from an inquiry as to whether the maker of the check had funds in the bank to meet payment on presentment, or whether it would be paid when presented. In the latter case a negative answer would excuse presentment, as it would be useless, and "the law neither does nor requires idle acts." (Sec. 6200, Rev. Codes.) But, while the bank might be required to advise the payee, over the telephone or otherwise, as to whether a check will be paid on presentment, provided the signature is genuine and the check in due form, it could not be required, under any circumstances short of having certified the check, to guarantee the payment of it.

As heretofore stated, a check is payment until dishonored; it can only be dishonored by presentment at the bank on which it is drawn, in regular form, and refusal of payment. Section 6033, Revised Codes, provides that "a check is a bill of exchange drawn on a bank payable on demand." Section 6035 declares that "where a check is certified by the bank on

which it is drawn, the certification is equivalent to an acceptance"; and, under section 6037, "a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Sharp, the cashier of the Custer State Bank, called on behalf of the defendant, testified that, in response to his inquiry: "Mr. Langworthy replied those checks drawn by McCain required the O. K. of somebody in the office before he was authorized to pay it, but he added the check would undoubtedly be paid when presented." Langworthy, called in rebuttal, testified that he stated that "Without any question the check would be paid when it was presented properly; that if he would give me about five minutes or so, I would call Mr. O'Donnell on the phone, or see him with reference to this check, and advise him again." Within thirty minutes O'Donnell advised defendant that the check was perfectly good, and would be paid on presentment, but in the meantime defendant had deposited the check in the postoffice, addressed to the maker.

The statement of Langworthy was not that the check was not perfectly good, taken in the most favorable light to the defendant; it was coupled with the expression of his opinion that it would be paid when presented. It was the duty of the defendant to present the check for payment, either to the bank directly or through another, as by deposit with the Custer State Bank, and collection by it. Having made an informal request of the Billings bank, he should at least have waited a reasonable time for an answer. On receipt of advice that the check would be paid, he could have easily secured the return of the check at the postoffice. Having failed to present the check for payment, defendant was in no position to declare a rescission of the contract for nonpayment.

V. Defendant contends that the court erred in instructing the jury as follows: "The defendant having accepted the

[6] check in question in part payment of the purchase price of sheep, as evidenced by written memorandum of contract, he could not avoid or rescind the contract for nonpayment of check without having presented the check to the Bank of Montana for payment and having payment refused. Having failed to do so, plaintiff is entitled to recover herein for such damages, if any, as it may have suffered." The instruction correctly states the law, and is not open to the complaint that it advised the jury that the check must be presented in person to the bank.

No error was committed in the refusal of instructions not in harmony with the above-quoted instruction.

We find no substantial error in the record, and the judgment and order of the district court are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

MCMURRAY, APPELLANT, v. MCMURRAY, RESPONDENT.

(No. 4,166.)

(Submitted June 3, 1920. Decided June 25, 1920.)

[190 Pac. 924.]

Husband and Wife—Marriage—Annulment—Alimony, Suit Money and Attorney's Fee—Extent of Power of District Court.

1. In annulment proceedings the trial court may allow defendant wife temporary alimony, suit money and attorney's fees to enable her to defend, its power in that behalf continuing while the validity of the marriage remains in doubt, that is, while the suit is pending, whether in the district court or in the supreme court on appeal, and ending on entry of final decree in favor of plaintiff.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

ANNULMENT PROCEEDINGS by Willis A. McMurray against Bessie L. McMurray. From an order awarding defendant temporary alimony, suit money and attorney's fees, plaintiff appeals. Affirmed.

Mr. H. S. McGinley, for Appellant, submitted a brief and argued the cause orally.

Messrs. Stranahan & Stranahan and *Mr. C. W. Wiley*, for Respondent, submitted a brief.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Plaintiff having commenced annulment proceedings, the court, on application of the defendant, awarded her temporary alimony, suit money and attorney's fees necessary to enable her to defend. The plaintiff appeals, challenging the jurisdiction of the court to make such an order in an annulment proceeding.

The question thus raised was disposed of contrary to the [1] contention of plaintiff in the case of *State ex rel. Wooten v. District Court*, 57 Mont. 517, 189 Pac. 233. However, as the power of the court exists only while the validity of the marriage continues in doubt, or, as was said in the *Wooten Case*, while "the annulment suit is pending, whether in the district court, or in this court on appeal," the allowance, under the order, will cease upon the final entry of a decree in favor of the husband.

The order of the district court of Chouteau county is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

ROBISON, APPELLANT, v. DOVER LUMBER CO., RESPOND-
ENT.

(No. 4,144.)

(Submitted May 28, 1920. Decided July 6, 1920.)

[191 Pac. 383.]

*Chattel Mortgages—Impairment of Security—Damages—Evi-
dence—Measure of Damages—Pleading—Admissions—Is-
sues—Instructions.*

**Chattel Mortgages—Impairment of Security—Evidence Inadmissible as
Speculative.**

1. In an action by the mortgagee of a timber flume to recover damages for its destruction and consequent impairment of his security, testimony offered by him that there was merchantable timber on government land near the flume to cut which he might have secured a contract and thus used the flume and realized a profit, *held* properly excluded as speculative.

Same—What not Defense—Estoppel.

2. Where mortgaged property is injured or its value lessened, the wrongdoer is liable to the mortgagee and may not be heard to justify his wrongful act by invoking the provisions of a contract under which the property would have become the property of another in the event of a certain contingency.

Same—Measure of Damages.

3. The measure of damages in an action for the destruction of mortgaged property and impairment of the mortgagee's security is the amount remaining due upon the debt secured by the mortgage, not to exceed the value of the property claimed to have been damaged.

Trial—Pleading—Admissions—Instructions.

4. The complaint having alleged that the value of the flume was totally destroyed, and the answer having admitted that it was of no value, there was no issue on the question of value and an instruction thereon was unnecessary and misleading.

*Appeal from District Court, Sanders County; Asa L. Dun-
can, Judge.*

ACTION by C. S. Robison against the Dover Lumber Com-
pany. From a judgment for defendant, and an order deny-
ing his motion for new trial, plaintiff appeals. Reversed and
remanded.

Cause submitted on briefs of Counsel.

Mr. H. O. Bond, Mr. John E. Patterson and Mr. Lewis M. Simes, for Appellant.

Mr. A. S. Ainsworth, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

By a contract entered into with the government of the United States on December 5, 1912, J. P. McKay agreed to purchase a large amount of timber along Canyon Creek in the Cabinet National Forest. The contract authorized McKay to go upon the reservation and install the equipment necessary to remove the timber purchased, and pursuant to that authority he constructed a logging flume for the purpose of floating the logs to be cut, down Canyon Creek into Vermillion Creek, through which latter creek they were to be moved into Clark's Fork of the Columbia, there to be delivered to the Dover Lumber Company, to which company McKay had contracted to sell them. After the flume was completed, McKay gave to this plaintiff a chattel mortgage upon it to secure an indebtedness of \$2,500 with interest. McKay's contract with the government expired on October 1, 1914, and contained a provision that any equipment not removed within ninety days thereafter should become the property of the government. His contract with the Dover Lumber Company provided, among other things, that if he should fail to carry out any of its provisions by December 1, 1913, the lumber company might, at its option, take possession of the equipment and complete the contract.

This action was brought by plaintiff, as mortgagee, to recover damages for the wrongful destruction of the flume and the consequent impairment of his security. After setting forth the execution and delivery of the note and mortgage securing its payment, it is alleged in the complaint that about January 14, 1914, defendant took possession of the flume, and between that date and August 1, following, used it, and in its

use negligently, carelessly and wantonly tore out, displaced and destroyed it to such extent as to render it valueless; that immediately before the flume was destroyed it was of the reasonable value of \$10,000 and was ample security for the indebtedness due from McKay to plaintiff; that only \$100 has been paid upon the debt secured by the mortgage; that plaintiff has no other security; that the mortgagor is insolvent; and that by reason of the destruction of his security he has been damaged in the sum of \$2,723.15, the amount of the unpaid balance.

The answer admits the execution and delivery of the note and mortgage; denies that the flume was of any value whatever; denies any negligence, carelessness or wantonness on defendant's part, or that by any act of defendant, plaintiff's security was impaired, or that plaintiff has been damaged in any sum or at all. The answer then attempts to plead two affirmative defenses: First, that the flume was constructed by McKay with money furnished by defendant, by reason whereof defendant had a right to or interest in it prior and superior to the lien of plaintiff's mortgage; and, second, that the flume was constructed upon the national forest under a license from the government, which license expired before the commencement of this action, and that the flume is the property of the United States. The reply admits that the flume was constructed upon the forest reservation under a permit from the government, and denies all the other affirmative allegations.

The trial of the cause resulted in a verdict for defendant, and plaintiff appealed from an order denying his motion for a new trial.

Complaint is made that the court did not permit plaintiff [1] to prove that there was a large amount of merchantable timber upon the reservation near the flume; that plaintiff might have secured a contract from the government to cut such timber; that he could have taken possession of the flume and used it to remove such timber and could have realized

a profit from the operations sufficient to satisfy the indebtedness due him from McKay. The ruling was correct. Plaintiff did not offer to prove that he had a contract with the government for the purchase of timber, and whether he could have secured a contract, and, if so, whether upon such terms as to be profitable, were matters of speculation altogether. (17 Corpus Juris, 785.) Plaintiff was permitted to prove that the reasonable value of the flume immediately before it was injured was greater than the amount due him from McKay and cannot complain that he was not permitted to do more.

The other assignments refer to instructions given and refused. Instruction 9, given by the court, while not essentially [2] erroneous, is altogether inapplicable. According to the undisputed evidence, the flume was destroyed long before McKay's contract with the government expired, and defendant cannot be heard to justify its wrongful act by invoking the provision of the contract under which it is contended the flume would have become the property of the government if not removed before January 1, 1915. The government might have made such modifications of its contract as it saw fit. It might or might not have availed itself of the benefit of that provision; but, whether it did or not, defendant is liable if by its wrongful or negligent act the flume was injured or its value lessened to plaintiff's prejudice. The same objection may be urged to instruction 14, given by the court. In other words, the provisions of McKay's contract with the government could not be injected into this controversy to any extent whatever, except in so far as the provision for forfeiture of the flume to the government after January 1, 1915, might reflect upon the value of the flume at the time it was destroyed.

The court erred also in giving instruction 12, which assumed that McKay's contract with the lumber company gave to the lumber company a property interest in the flume. The contract does nothing of the kind. At most, it gave to the lumber company only the right to use the flume in a careful and

prudent manner, in the event that McKay failed to carry out the contract.

These three instructions emphasize the fact that the cause was tried and submitted upon an erroneous theory—a theory which transformed a very simple case into one so complicated that it is doubtful whether the jury comprehended it in any respect. The case presented by the pleadings is of the simplest character. The only issues to be submitted to a jury were: (1) Did the destruction of or injury to the flume result from defendant's wrongful or negligent act? If this inquiry was answered in the negative, a verdict for defendant would follow as of course. If answered in the affirmative, then it became necessary for the jury to determine: (2) The value of the flume immediately before it was injured, and (3) the [3] amount remaining due to plaintiff. If plaintiff is entitled to recover, the measure of his damages is the amount remaining due upon the debt secured by the mortgage, not to exceed the value of the flume. (11 Corpus Juris, 619.)

The court erred also in assuming by its instruction 13 that [4] the value of the flume after it was injured was an issue to be determined by the jury. It is alleged in the complaint that the value of the flume was totally destroyed, and the answer admits that it was of no value. There was therefore no issue upon that question, and the instruction could not fail to mislead the jury. (*Sullivan v. Metropolitan Life Ins. Co.*, 35 Mont. 1, 88 Pac. 401.)

Because of the particular errors herein considered and because of the fact that the case was tried upon an erroneous theory, the order is reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

**BANK OF COMMERCE, RESPONDENT, v. UNITED STATES
FIDELITY & GUARANTY CO., APPELLANT.**

(No. 4,115.)

(Submitted April 12, 1920. Decided July 6, 1920.)

[194 Pac. 158.]

*Sheriffs—Action on Official Bond—Wrongful Attachment—
Claim and Delivery—Sales—Statute of Frauds—Motion for
Directed Verdict by Both Parties—Effect—Conflict in Evi-
dence—Appeal and Error.*

Trial—Directed Verdict—Motion by Both Parties—Effect.

1. Where both parties at the close of the testimony moved the court for a directed verdict and the motion of plaintiff was granted, failure of defendant to request the submission of a certain issue to the jury amounted to a waiver of determination by the jury, and the question of fact involved was one for decision by the court.

Sheriffs—Wrongful Attachment—Liability.

2. A sheriff who wrongfully seizes personal property under a writ of attachment may be sued therefor in any appropriate form of action the person whose rights have been invaded may choose to pursue.

[On liability for suing out attachment maliciously and without probable cause, see note in 7 Ann. Cas. 541.]

Same—Wrongful Attachment—Sales—Statute of Frauds—Immediate Delivery—Continued Change of Possession—Official Bond—Suretyship.

3. In an action against a surety company to recover upon the official bond of a sheriff for his failure to return personal property or pay its value, in obedience to a judgment in an action in claim and delivery for the wrongful seizure thereof under a writ of attachment, evidence held sufficient to warrant the judgment in the action in replevin, the effect of which was that the attached property had been sold to plaintiff in good faith prior to its sequestration by attachment, the sale being accompanied by an immediate delivery and continued change of possession.

(MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HURLY, dissenting.)

Conflict in Evidence—Judgment—Affirmance.

4. Where the evidence is conflicting, the judgment will not be disturbed on the asserted ground of its insufficiency, especially where that court again passed upon its sufficiency on motion for new trial and overruled the motion.

Appeal from District Court, Rosebud County; Charles L. Crum, Judge.

ACTION by the Bank of Commerce of Forsyth, Montana, against the United States Fidelity & Guaranty Company.

Judgment for plaintiff. Defendant appeals from it and an order denying its motion for a new trial. Affirmed; Mr Chief Justice Brantly and Mr. Justice Hurly dissenting.

Messrs. Gunn, Rasch & Hall, for Appellant, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

Sureties on an official bond are not precluded from their defense because of a default judgment against the principal. (*Foxcroft v. Nevens*, 4 Me. 72; *Dawes v. Shed*, 15 Mass. 6, 8 Am. Dec. 80; *Baylies v. Davis*, 1 Pick. (Mass.) 206; *United States v. Rundle*, 107 Fed. 227, 52 L. R. A. 505, 46 C. C. A. 251; *Herrick v. Conant*, 4 La. Ann. 276; *Picot v. Signiago*, 27 Mo. 125; *Allison v. Thomas*, 29 La. Ann. 732; 23 Cyc. 752.)

When the third party claimant has proceeded under section 6673, Revised Codes, and the attaching plaintiff has given an indemnity bond, which requires the sheriff to retain possession of the property, he waives his right to replevy the goods. Then the only remedy of such claimant is an action against the sheriff to recover damages for conversion or trespass. He can recover whatever damages he may have sustained by the attachment, if he is the owner of the property, while the sheriff is protected from such an action by his indemnity bond and the attaching plaintiff still has the attached property pending the final determination of his suit. If the attachment suit is decided in favor of the defendant, then the sheriff must turn over the property to him (sec. 6678), and the defendant in an attachment suit is protected by the undertaking given at the time the attachment was made. That an action in conversion or trespass is the proper remedy against the sheriff in such cases, see *Breard v. Lee*, 192 Fed. 72, where the court construed the California section similar to section 6673 of our Code. (See, also, *Paden v. Goldbaum*, 4 Cal. Unrep. 767, 37 Pac. 759; *Ferrat v. Adamson*, 53 Mont. 172, 163 Pac. 112; *Western Mining Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 28 L. R. A. (n. s.) 214, 105 Pac. 732.)

Defendant contends that there is no substantial evidence to prove a sale of the property to the Bank of Commerce "accompanied by an immediate delivery and followed by an actual and continued change of possession" such as is required by section 6128, Revised Codes, and that for this reason defendant's motion for a directed verdict should have been sustained. (*Taylor v. Malta Mercantile Co.*, 47 Mont. 342, 132 Pac. 549; *Kerr v. Blaine*, 49 Mont. 602, 144 Pac. 566; *Boothby v. Brown*, 40 Iowa, 104; *Israel v. Day*, 41 Colo. 52, 92 Pac. 698; *Ruddle v. Givens*, 76 Cal. 457, 18 Pac. 421; *Clark v. Lee*, 78 Mich. 221, 44 N. W. 260; *Chickering & Son v. White*, 42 Minn. 457, 44 N. W. 988; *Missinskie v. McMurdo*, 107 Wis. 578, 83 N. W. 758; *Steele v. Benham*, 84 N. Y. 634; 20 Cyc. 543.)

Under the common law and the statutes of this state, as adopted from California after being construed there, Van der Pauwert never had possession of this property, and therefore neither he nor his bondsmen are liable for failing to turn it over. In the absence of statute so providing, it is not the duty of the sheriff at the expiration of his term to turn over to his successor in office personal property held by him under writ of attachment. He must proceed with the execution of the writ and keep the property and have it forthcoming on demand at the final determination of the attachment suit. This state has no statute modifying the above common-law rule. The following authorities also hold that in the absence of statute expressly requiring the sheriff at the expiration of his term to turn over to a successor personal property held by him under writ of attachment, he must proceed with the execution of the writ and keep the property in his possession. (*People v. Kendall*, 14 Colo. App. 175, 59 Pac. 409; *Tukey v. Smith*, 18 Me. 125, 36 Am. Dec. 705 and note; *Baker v. Baldwin*, 48 Conn. 131; *Lambard v. Fowler*, 25 Me. 308; *Barden v. Douglass*, 71 Me. 400; Freeman on Executions, sec. 62; 17 Cyc. 1233; 6 Corpus Juris, p. 313, sec. 603.) The only statute in this state authorizing the sheriff's successor

to complete the execution of process is section 6840, Revised Codes, relating only to real estate. If Van der Pauwert was not in possession, it was fatal to an action in claim and delivery. (*Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302.)

Messrs. Collins, Campbell & Wood, for Respondent, submitted a brief; *Mr. Donald Campbell* argued the cause orally.

The appellant is bound in this action by the judgment rendered in the replevin action between the appellant and John Van der Pauwert as to the matters therein found and determined.

The replevin action instituted by the respondent bank against Van der Pauwert, as sheriff, was an action brought solely for the purpose of determining the right of possession in the respondent bank to the personal property in question. It was properly brought against the sheriff, because he was then the party in possession, although as a defendant in such case he was merely the representative of the attaching creditor, and had no personal interest in the subject matter of the litigation. In the case of *Wilde v. Rawles*, 13 Colo. 583, 22 Pac. 897, the court quoted with approval the following language taken from the case of *Miller v. Bryan*, 3 Iowa, 58: "In these cases the sheriff is a necessary, and yet really the nominal, party defendant. Those really interested are the attaching or execution plaintiffs."

The case of *Rodini v. Lytle*, 17 Mont. 448, 52 L. R. A. 165, 43 Pac. 501, relied upon by appellant, must be read in connection with the decision in the case of *Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583. The case last named was a replevin action brought against a constable and his bondsmen on his official bond, and it was there held that such an action lay only against the party in possession, and the sureties upon the bond were improperly joined as parties defendant, and were not in any manner concerned with the seizure or detention of the property. The rule is stated in 34 Cyc. 1425, as

follows: "In an action of replevin, the person in possession of the property is ordinarily the proper and only necessary party defendant," and *Gallick v. Bordeaux, supra*, is there cited as an authority.

By the terms of the judgment rendered in the replevin case, Van der Pauwert, as sheriff, was commanded to return the property in question to the respondent bank, or to pay to the bank its value, less certain credits. This was an absolute duty and liability fixed upon the sheriff by the terms of such judgment. He neither returned the property nor paid to the bank its value, and it is for this failure and breach of duty that the present action is prosecuted against the surety upon his official bond. The judgment in the replevin case is the evidence of the obligation or duty. The failure to comply with the terms of the judgment is the evidence of the breach of such obligation or duty.

For the foregoing reasons we respectfully submit that the judgment in the replevin case is conclusive evidence in the case at bar as against the surety as to all matters and things adjudicated thereby and contained therein, and that the rule in the case of *Rodini v. Lytle* has no application.

The respondent, at the time of the institution of its action in replevin, was entitled to institute and prosecute such action for the purpose of recovering its property which had theretofore been levied upon under a writ of attachment in an action not brought against respondent. (*Wood v. Weimar*, 104 U. S. 786, 26 L. Ed. 779 [see, also, Rose's U. S. Notes]; *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301; *Overby v. McGee*, 15 Ark. 459, 63 Am. Dec. 49; *Carpenter v. Innes*, 16 Colo. 165, 25 Am. St. Rep. 255, 26 Pac. 140; *Reiley v. Haynes*, 38 Kan. 259, 5 Am. St. Rep. 737, 16 Pac. 440; *Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593; *Hawk v. Lepple*, 51 N. J. L. 208, 14 Am. St. Rep. 677, 4 L. R. A. 48, 17 Atl. 351; *Dunham v. Wyckoff*, 3 Wend. (N. Y.) 280, 20 Am. Dec. 695; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; *Crittenden v. Lingle*, 14 Ohio St. 182, 84 Am. Dec. 370;

MacIver v. Williamson-Halsell-Frasier Co., 19 Okl. 454, 13 L. R. A. (n. s.) 696, 92 Pac. 170; *Alexander v. Alexander* (Okl.), L. R. A. 1917D, 984, 164 Pac. 114; 23 R. C. L. 879; 34 Cyc. 1370.)

MR. JUSTICE COOPER delivered the opinion of the court.

The respondent bank, plaintiff below, recovered a judgment against appellant as surety upon the official bond of the sheriff of Rosebud county for the sum of \$1,557.43, upon a cause of action growing out of the following state of facts:

In November, 1913, one E. S. Haskell commenced an action against the firm of Woolston & Holland, a copartnership conducting a garage and automobile business in the town of Forsyth in said county, to recover a balance of about \$5,000 alleged to be due him from said firm, for goods sold and delivered to them. On the same day a writ of attachment was issued out of the district court of that county and by the sheriff thereof levied on property supposed to belong to the firm. The respondent bank filed and served upon the sheriff a third-party claim for the property so attached. On November 25 the plaintiff in the attachment suit delivered to the then sheriff (William E. Moses) a bond securing the sheriff in the retention of the attached property. In the following January the sheriff was killed and John Van der Pauwert, who had theretofore during the incumbency of said Moses served as undersheriff, was on February 4 appointed and duly qualified as the successor of Moses. On June 30, and while the suit in attachment was still pending, the respondent bank commenced an action in claim and delivery against Van der Pauwert alone. Failing to appear, in due course a default was taken against him, and a judgment rendered and entered determining that the possession and ownership of the property was in the respondent bank at the time of the levy of the attachment upon the property in question, and that defendant therein was in possession thereof and wrongfully withholding the same from the plaintiff. The judgment also

provided for a return of the property to the bank, or for its value in case delivery could not be had. On January 28, 1916, a writ of execution was issued in the claim and delivery action, for the return of the property to the bank. Upon service of the writ on Van der Pauwert, he responded that he was unable to return any of the property. No return appears to have been made on the writ of execution. On February 18, 1916, this action was commenced against appellant on the official bond of Van der Pauwert for his neglect and refusal to return the property so attached, or its value in money.

It appears in evidence that the defendant Van der Pauwert was acting as undersheriff for Moses during the time of the occurrences in question; that he had full knowledge of the business both before and after his assumption of the office of sheriff; that he was conversant with the transaction attending the seizure of the property under attachment proceedings at the suit of *E. S. Haskell v. Woolston et al.*; that while undersheriff he subjected some of the articles under attachment to his own personal use, and, as sheriff, took actual possession of it all, retained it during the pendency of all the proceedings now before us, and never did deliver the property to the plaintiff in response to its demand upon him.

At the close of all the testimony both the plaintiff and defendant moved the court to direct a verdict in its favor upon the ground that in the then state of the evidence there was no substantial issue of fact touching the immediate delivery followed by an actual and continued change of possession of [1] the property subjected to attachment at the suit of *Haskell v. Woolston et al.* The court denied the motion of the defendant, granted the motion of plaintiff and directed a verdict in plaintiff's favor. The defendant, after the ruling against it, did not request the court to submit that issue to the jury. In this condition of the case, the question of fact involving the delivery of the property by Woolston to the plaintiff and the continued retention of it by plaintiff was for determination by the court, as held in the recent decision of

this court in the case of *Fifty Associates Co. v. Quigley*, 56 Mont. 348, 185 Pac. 155. The district court having found that issue in favor of the plaintiff and rendered judgment in its favor, it is now left for us to say whether there was in the case below a substantial issue of fact upon which the judgment can legally rest.

The pleadings put in issue the possession and ownership of the property at the time of the attachment. If that issue is to stand determined in favor of plaintiff, the other questions [2, 3] discussed are so far subordinate to it as to require no consideration. Plainly, the sheriff could not justify the seizure of the property of a stranger to the writ. Having wrongfully seized the property, he may be sued therefor in any appropriate form of action the bank, whose rights have been invaded, may elect to pursue. (2 Freeman on Executions, sec. 272, and authorities cited.)

Where the evidence is conflicting, the judgment of the lower [4] court will not be disturbed on appeal. (*Mattock v. Goughnour*, 13 Mont. 300, 34 Pac. 36; *Welch v. Nichols*, 41 Mont. 435, 110 Pac. 89.) The trial court had the witnesses before it, heard the testimony, had an opportunity to observe their demeanor upon the stand, and, having found for the plaintiff upon what we deem a substantial conflict in the testimony, "its action thereon will not be disturbed, unless it is manifest that its discretion has been abused." (*Welch v. Nichols, supra.*) The district court again passed upon the sufficiency of the evidence on the motion for a new trial, and its order overruling the motion will not be disturbed in the absence of a showing of abuse of discretion. (*Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871; *White v. Barling*, 41 Mont. 138, 108 Pac. 654; *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775.) In *Chestnut v. Sales*, 44 Mont. 534, 121 Pac. 481, this language was used: "As the cause was decided for the plaintiff, it must be presumed that he established those facts which the evidence on his part fairly tended to prove, and that every disputed question of fact was resolved in his

favor." It was the duty of the trial court, upon defendant's motion for a new trial, to say whether the evidence in weight justified the verdict. (*Harrington v. Butte etc. Min. Co.*, 27 Mont. 1, 69 Pac. 102.)

Whether Woolston & Holland had in good faith sold the property before its sequestration by attachment and accompanied the sale by an immediate delivery and continued change of possession, was the vital question before the court. This fact the district court determined in favor of the plaintiff. After a careful review of all the testimony, we are not prepared to differ with that court in its conclusion that the testimony was sufficient to establish that fact. "As between the parties to a sale of personal property, it is wholly immaterial whether there is any delivery of the thing sold. It is equally true that a mere creditor, as such, does not have any interest whatever in his debtor's property. If the Shackleton & Whiteway Construction Company had in good faith sold all this property to Farnham and others on June 26, and had accompanied the sale by an immediate delivery, Parr could not complain, even though such sale might operate to defeat him in the collection of his debt." (*Western Min. Supply Co. v. Quinn*, 40 Mont. 156, 135 Am. St. Rep. 612, 20 Ann. Cas. 173, 28 L. R. A. (n. s.) 214, 105 Pac. 732.)

The judgment and order appealed from are affirmed.

Affirmed.

MR. JUSTICE MATTHEWS concurs.

MR. JUSTICE HOLLOWAY: I concur in the result only.

MR. CHIEF JUSTICE BRANTLY: I do not concur in the result reached in the majority opinion. Section 6128 of the Revised Codes declares that every transfer of personal property, such as the one in question here, "is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued

change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession," etc. As I view it, the evidence shows that at the time of the transfer to the bank, Woolston was the owner and in exclusive possession of the garage and its contents; that Holland had then retired from the firm, having turned over his interest to Woolston; that, when the transfer was completed, the bank authorities arranged with Woolston to resume possession of the garage and its contents and to continue the business under the name of Woolston & Company for the benefit of the bank; that he did so, and that no notice was given of this arrangement either by Woolston or the bank until after the attachment was levied. To a stranger not cognizant of what had taken place, there was nothing to show any change of possession. In my opinion, this did not meet the requirement that the sale, to be valid, must not only have been accompanied by an immediate delivery but also followed by an actual and continued change of possession.

MR. JUSTICE HURLY concurs in the above dissenting opinion.

DEGENHART, RESPONDENT, v. CARTIER ET AL.,
APPELLANTS.

(No. 4,172.)

(Submitted June 4, 1920. Decided July 6, 1920.)

[192 Pac. 259.]

*Chattel Mortgages—Attaching Creditors—Deposit—Effect—
Subrogation—Appeal and Error—Sales—Innocent Purchaser.*

Sales—"Innocent Purchaser."

1. To be an "innocent purchaser," a vendee must in good faith pay a valuable consideration without notice of outstanding legal or equitable rights.

Chattel Mortgages—Attaching Creditors—Deposit—Wrongful Satisfaction of Mortgage—Damages—Proximate Cause.

2. Evidence in an action by an attaching creditor to recover the amount of the deposit made by him at the time he attached mortgaged chattels, on the alleged ground that his right of recoupment against the attached property had been destroyed by the wrongful act of the mortgagee, after payment of the deposit to him, in certifying of record that the mortgage had been fully satisfied and discharged, thus causing the property to be subsequently sold to an innocent purchaser, *held* to show that the purchaser was not an innocent one, that the loss sustained by plaintiff was due to his own relinquishment of his lien, and not to the wrongful act of defendant, and that the latter was therefore not liable.

Same—Effect of Deposit by Attaching Creditor—Subrogation.

3. By depositing the amount of a prior chattel mortgage, an attaching creditor is subrogated to the right of the mortgagee for the purpose of subjecting the property to the satisfaction of his claim.

Appeal and Error—Judgment to be Sustained, to What Extent.

4. If under his pleading and the undisputed evidence a party is entitled to some relief, the judgment should be sustained to the extent of the relief to which he is shown to be clearly entitled.

Appeal from District Court, Granite County; George B. Winston, Judge.

ACTION by Lee C. Degenhart against George A. Cartier and others. Judgment for plaintiff and defendants appeal. Reversed and remanded, with directions.

Mr. Wingfield L. Brown and Mr. R. Lewis Brown, for Appellants, submitted a brief; Mr. Wingfield L. Brown argued the cause orally.

Mr. S. P. Wilson and Mr. J. J. McDonald, for Respondent, submitted a brief; Mr. Wilson argued the cause orally.

Under the doctrine of money had and received, plaintiff is entitled to recover. Appellant took and received from the county treasurer money, which in equity and good conscience he ought not to retain, but in equity and good conscience he should return to respondent. The law implies a promise, an obligation, on the part of Power to repay the same. The legal principles here involved have been declared by the courts upon many occasions. (*Mechanics & Miners' Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac.

218.) The underlying principle of equity that inspires the decisions in all the cases applies very emphatically to the instant case. (*Dresser v. Kronberg*, 108 Me. 423, Ann. Cas. 1913B, 542, 36 L. R. A. (n. s.) 1218, 81 Atl. 487.)

Where money is paid for a particular consideration and the consideration fails, an action for money had and received will lie for its return. (27 Cyc. 855; *Rogers v. Walsh*, 12 Neb. 28, 10 N. W. 467, 468; *Warder, Bushnell & Glessner Co. v. Myers et al.*, 70 Neb. 15, 96 N. W. 992; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46; *Dashaway Assn. v. Rogers et al.*, 79 Cal. 211, 21 Pac. 742; *Reina v. Cross*, 6 Cal. 29; *Burke v. Milwaukee, L. S. & W. Ry. Co.*, 83 Wis. 410, 53 N. W. 692; *American Exchange Nat. Bank v. Loretta Gold & S. Min. Co.*, 165 Ill. 103, 56 Am. St. Rep. 236, 46 N. E. 202.)

Where money is received to be applied to a particular purpose and it is not applied to that purpose, an action in money had and received will lie by the one who pays the money against the one who receives it. (27 Cyc. 862; *Gillespie v. Evans*, 10 S. D. 234, 72 N. W. 576, 577; *Stewart v. Phy*, 11 Or. 335, 3 Pac. 443; *Dennis v. Pabst Brewing Co.*, 80 Minn. 15, 82 N. W. 978; *O'Donnell v. Perrin*, 77 Mich. 173, 43 N. W. 774; *Clark v. Jenness*, 188 Mass. 297, 74 N. E. 343; *Messenger v. Votaw*, 75 Iowa, 225, 39 N. W. 280; *Ph. Zang Brewing Co. v. Bernheim*, 7 Colo. App. 528, 44 Pac. 380; *Finch v. Park*, 12 S. D. 63, 76 Am. St. Rep. 588, 80 N. W. 155.)

The court found that in taking plaintiff's deposit from the treasurer, defendant Power converted the same and the testimony and the law sustained this finding. Before Power received the deposit, he by his own acts had placed the legal status of the mortgaged property in such condition that plaintiff, not Power, was entitled to take back the deposit; hence Power converted the fund. (*Morrin v. Manning*, 205 Mass. 205, 91 N. E. 308; *Dunham v. Cox*, 81 Conn. 268, 70 Atl. 1033; 38 Cyc. 2014.) It may be conceded, for the sake of argument, that in the absence of other inconsistent acts on the part of Power, his act in filing the second mortgage and in

asserting claim to the mortgaged property under it were not unlawful. After Power filed his second mortgage he had two courses to pursue: (a) He could decline plaintiff's deposit and retain his mortgage, and thus stop further proceedings of plaintiff; (b) he could accept plaintiff's deposit and allow plaintiff to pursue his remedy. By filing his second mortgage he elected unequivocally to pursue the course (a), because thereby he prevented further proceedings by plaintiff. The two courses were inconsistent and repugnant to each other, and after electing his course (a) he could not thereupon choose and pursue course (b) as well, as he attempted to do. Having elected course (a), then Power had no right to detain or receive plaintiff's deposit from the treasurer. (*O'Meara v. McDermott*, 43 Mont. 189, 115 Pac. 912; *Clausen v. Head*, 110 Wis. 405, 84 Am. St. Rep. 933, 85 N. W. 1028, 1029.) "He was where he could take either of two roads, but not both. The roads reached out in different directions so that to travel one necessarily required the abandonment of the other, and the choice of one with knowledge of the facts destroyed beyond recall the opportunity to take the other." (*Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Chicago, B. & Q. R. Co. v. Bigley*, 1 Neb. (Unof.) 225, 95 N. W. 344, 345; *Reints & DeBuhr v. Uhlenhopp*, 149 Iowa, 284, 128 N. W. 400; *Davis v. Schmidt*, 126 Wis. 461, 110 Am. St. Rep. 938, 106 N. W. 119; *Herbert v. Wagg*, 27 Okl. 674, 117 Pac. 209, 210; *Wilmore v. Mintz*, 42 Colo. 328, 20 L. R. A. (n. s.) 259, 95 Pac. 536.) The purpose of the deposit having failed at the election of Power and by the act and conduct of Power, then plaintiff immediately became entitled to withdraw his deposit. From that moment Power's act in receiving the deposit constituted a conversion thereof.

Under the doctrine of estoppel the defendant, by reason of his utterly inconsistent act of filing the second mortgage and asserting claim thereunder, would be estopped to lay claim to plaintiff's deposit. (16 Cyc. 785-787; *Newell v. Meyendorff*, 9 Mont. 254, 18 Am. St. Rep. 738, 8 L. R. A. 440, 23 Pac.

333; *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108; *Well, Fargo & Co. v. Alturas Com. Co.*, 6 Idaho, 506, 56 Pac. 165.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The complaint in this action has been before this court on the question of its sufficiency. (*Degenhart v. Cartier et al.*, 52 Mont. 102, 157 Pac. 637.) The action was brought to recover the sum of \$1,012.80, with interest—it being alleged in the complaint that plaintiff had theretofore commenced an action against defendant Cartier, and caused a writ of attachment to be issued therein and placed in the hands of the sheriff for service; that the only property possessed by Cartier, and not exempt from execution, was certain livestock, of the value of \$1,600, subject to a chattel mortgage to the defendant Power to secure a note for \$1,000; and that, in compliance with section 5766, Revised Codes, plaintiff deposited the amount due on the mortgage with the county treasurer, payable to Power. The complaint then alleges that before the sheriff could reach the property, and before the levy of the writ, learning of the commencement of the action, defendants caused a second chattel mortgage for the sum of \$675, made by Cartier to Power, to be filed, and thereafter, on the day following the levy, served written notice on the sheriff that Power claimed a lien on the property by virtue of the second mortgage. The complaint further alleges that the sheriff did release the property from the attachment, and thereupon the defendant Power demanded and received from the county treasurer the moneys which had been deposited, and that Power thereupon satisfied the mortgage of record. The complaint then alleges that thereafter the defendants caused other and further encumbrances and mortgages to be given and placed on the property, and caused the said property to be sold and disposed of, and to come into the hands of innocent purchasers; that the Cartiers are insolvent, and that Power had kept the money so received from the

county treasurer. The complaint concludes with the allegation:

"That the acts and things above mentioned as done by the defendants were wrongfully done, for the single purpose of preventing, as they did prevent, the plaintiff from proceeding with the attachment or getting back his deposit, to his damage in the sum of \$1,012.80," the amount so deposited with the county treasurer.

This court, having determined that the complaint did state a cause of action, remanded the cause, with direction to overrule the demurrer, and thereafter the defendant Power, and defendants Cartier and wife, filed separate answers, setting up all of the transactions leading up to the commencement of this action at length. Much of this matter was irrelevant or surplusage, and was by the court stricken from the separate answers. Certain allegations in the answers, which may have been material to the issues, were also stricken; but, as these matters do not affect the conclusion herein reached, the court's rulings thereon will not be considered. The proof substantiates the allegations of the complaint, except in certain very important particulars, which will be hereafter noted.

1. In the case of *Degenhart v. Cartier, supra*, it is held that, [1, 2] by depositing the amount due on a chattel mortgage in the manner provided by law, an attaching creditor does not pay the debt nor discharge the mortgage, but is subrogated to the rights of the mortgage, and that, if his attachment should fail, he still has recourse to the property for the amount paid to the mortgagee. The opinion, written with the complaint alone before the court, holds that "the theory underlying the whole complaint is * * * that the defendants could not lawfully destroy the right of recourse as against the mortgaged property for the amount so paid, thus obtained by the plaintiff; that they did destroy it when, under the circumstances stated, Power certified of record that the chattel mortgage had been fully paid, satisfied and discharged, and in so doing committed a wrongful act, redressible in damages,"

is substantially correct. However, among the "circumstances stated" in the complaint is the allegation that by their conduct the defendants caused the property to be sold and to pass into the hands of an *innocent purchaser*. To be an innocent purchaser, the vendee must, in good faith, pay a valuable consideration without notice of outstanding legal or equitable rights. (*Tate v. Kramer*, 1 Tex. Civ. App. 427, 23 S. W. 255.)

The testimony of the vendee, Greenheck, clearly negatives the allegation that he was an innocent purchaser; he had been attempting to purchase the cattle for some months; he knew of the mortgage and the commencement of the attachment suit, of the deposit by plaintiff and its withdrawal by Power, and of the dismissal of the suit and the return of the cattle by Cartier, and purchased the cattle some three weeks later. The witness testified that in the meantime he had had a conversation with Degenhart, and, while the court did not permit him, when a witness for the defense, to relate the conversation, on cross-examination as a witness for the plaintiff it developed that the witness had in that conversation said to Degenhart: "You had better hold on to the cattle, and he said that Durfee told him that Power had to give him a thousand dollars." Degenhart, called in rebuttal, did not deny that such a conversation took place.

On the former appeal, this court, speaking of the plaintiff's right of recoupment against the property, said: "As that right is a property right, he cannot be justly deprived of it by anyone, let alone the debtor, who has paid nothing, or the mortgagee, to whose claim against the property he has, in legal effect, succeeded. In our opinion, therefore, to destroy that right, as the complaint alleges it was destroyed in this instance, was a wrong, whether done by all the defendants, or by Power alone, and for its recovery can be had against the guilty party." But in order to avail himself of the rule laid down, the plaintiff must bring himself within the rule, by showing that his right was destroyed "as the complaint

alleges it was destroyed," to-wit, that, through the wrongful acts of the defendants, the property passed into the hands of an innocent purchaser. In other words, he must establish the causal connection between the wrongful acts of the defendants, or the defendant Power, and the resulting damage.

As heretofore stated, plaintiff was subrogated to the rights of Power in the mortgage; his deposit, and the subsequent receipt of the money by Power, did not operate as payment or discharge of the mortgage; and, as between plaintiff and defendant Cartier, the illegal cancellation of the mortgage had no effect whatsoever. Its only possible effect was to render a purchase of the property valid, when made in good faith by someone in ignorance of the lien against the property, and who would be entitled to rely on the record of cancellation. The uncontradicted testimony of Greenheck shows a voluntary relinquishment by plaintiff of his lien against said property, which action on the part of the plaintiff caused the loss complained of.

2. The trial court, in finding No. 12, found that the cancellation of the mortgage of record "did in fact cancel said mortgage and destroy the lien thereof, and the security of the plaintiff thereunder for his said deposit, and said act did prevent plaintiff from pursuing his remedy against the property." This finding, in the nature of a conclusion of law, was, under the rule above quoted from the former opinion of this court, erroneous.

3. The court also, in said finding No. 12, followed the allegation of the complaint that the defendants "caused the property to be sold and to come into the hands of innocent purchasers." The finding is supported by no evidence whatsoever; on the contrary, the undisputed evidence conclusively rebuts any such presumption.

Respondent relies on the principle that, where the consideration fails, an action for money had and received will lie; but here there is no failure of consideration. Plaintiff received just what he paid for—a subrogation to the rights of [3] Power in the chattel mortgage, for the purpose of sub-

jecting the property to his claim in the attachment suit. If his attachment suit failed, he had the right to subject the property to his claim for the amount of the deposit—all that he claims in this suit. (*Degenhart v. Cartier, supra; Deering & Co. v. Wheeler*, 76 Iowa, 496, 41 N. W. 200.) He had the property in his possession at the time of the dismissal of the attachment suit, the cattle having been turned over to him as keeper by the sheriff, and voluntarily yielded possession to Cartier. The deposit was not withdrawn by Power until some time after the demand for the return of the cattle, and approximately at the time of the dismissal of the attachment suit, up to which time Degenhart could have withdrawn his deposit. In receiving the amount of the deposit, Power secured nothing more than he was entitled to under the chattel mortgage, and, by doing so, in effect transferred his lien on the cattle to Degenhart. Neither the improper or wrongful satisfaction of the mortgage of record, nor the filing of subsequent encumbrances, in any manner affected the right so acquired by the plaintiff. As between himself and Cartier, he could have asserted his right at any time prior to the sale, and could have done so even after the sale to Greenheck, who had knowledge of the claim against the property, and at the time of the purchase gave the plaintiff the opportunity to make himself whole.

It is therefore clear that the resulting damage to the plaintiff was caused, not by the wrongful act of defendant Power, but by his own negligence and voluntary abandonment of his lien, and, having waived his right and permitted the property to be dissipated, he is now in no position to recover from Power, and thus deprive the latter of both his lien and the proceeds therefrom.

The judgment is reversed and the cause remanded, with direction to dismiss the complaint.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

(Decided September 24, 1920.)

ON MOTION FOR REHEARING.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Counsel for plaintiff, in urging a rehearing of this cause, contends that the opinion herein exonerates the defendants George A. Cartier and Carrie E. Cartier from liability on the note set up in the complaint herein. This contention is not justified by the wording of the opinion; it is there declared that the plaintiff is subrogated to the rights of the payee and mortgagee. The action was brought on the theory that the plaintiff was entitled to recover by reason of the wrongful acts of the defendants, acting jointly, in withdrawing the deposit from the county treasury and, at the same time, rendering the plaintiff's attachment of the property worthless, and this is the theory on which the appeal was prosecuted.

Under the theory on which the case was tried, the plaintiff was not entitled to recover from any of the defendants; however, as stated, plaintiff was subrogated to the rights of the payee and mortgagee, and could have proceeded to a foreclosure of the chattel mortgage, or, on a showing that the property had become dissipated and the mortgage worthless, and that, therefore, the note was no longer secured by mortgage, the plaintiff might have been in a position to sue on the note without a foreclosure.

The complaint herein alleges the making of the note by George A. Cartier and Carrie E. Cartier, the facts constituting a subrogation, and the manner in which the mortgaged property was disposed of, and that neither the note nor any part thereof has been paid, and prays for general relief. This court has held [4] that, in determining whether a complaint states a cause of action or entitles the plaintiff to any relief, if upon any view plaintiff is entitled to any relief, the pleading will be sustained. (*Raymond v. Blancgrass*, 36 Mont. 449, 93 Pac. 648; *Crawford v.*

Pierce, 56 Mont. 371, 185 Pac. 315.) By analogy it would seem that if, under the pleadings and the undisputed evidence in the case, the plaintiff is entitled to any relief, a judgment in his favor should be sustained to the extent of the relief to which he is thus clearly entitled.

The trial court has, however, never passed upon the question as to whether or not plaintiff is entitled to a judgment against the defendants George A. Cartier and Carrie E. Cartier on the note, and in the absence of a foreclosure of the chattel mortgage and a disposition of that question, may require the taking of additional testimony to determine the plaintiff's right to sue upon the note in disregard of the mortgage feature. The decision will therefore be modified, so that the closing paragraph shall read:

The judgment is reversed, and the cause remanded to the district court of the third judicial district, with direction to dismiss the complaint as to the defendant Power, and, by such further proceeding as it shall deem necessary, determine whether or not the plaintiff is entitled to judgment against the defendants George A. Cartier and Carrie E. Cartier on the note mentioned in the complaint.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES
HOLLOWAY, HURLY and COOPER concur.

**McINTYRE, APPELLANT, v. NORTHERN PACIFIC RAIL-
WAY CO. ET AL., RESPONDENTS.**

(No. 4,160.)

(Submitted June 2, 1920. Decided July 6, 1920.)

[191 Pac. 1065.]

*Railroads—City Yards—Personal Injuries—Duty Owing to
Trespassers — Directed Verdict — Evidence—Insufficiency—
Judgments — Rendition and Entry — Power of District
Judges.*

Personal Injuries—Railroads—City Yards—Duty Owing to Trespassers.

1. To a trespasser using a railway company's city yards for the purpose of crossing the tracks at a place not customarily used by those living in the vicinity or by the public as a crossing by acquiescence of the company, it owes no duty other than to avoid injury to him after his presence and peril have actually been discovered.

Same—Submission of Case to Jury—Scintilla of Evidence Insufficient.

2. To justify the submission of a personal injury case to the judgment of a jury, something more than a mere scintilla of evidence to sustain plaintiff's claim is required.

District Judges—Powers at Chambers.

3. After trial of a cause in a district other than his own, a judge cannot, upon return to his own district, render judgment therein or make any orders other than such as are authorized by statute or agreed to by the parties.

Same.

4. A judge at chambers in his own district cannot do anything in relation to cases pending there, other than what the statute authorizes.

Judgments—Must be Rendered in Open Court.

5. The rendition of a judgment is a judicial act which, to be valid, must be done in open court.

Same—Rendition of Judgment—What Constitutes—Signature by Judge not Necessary.

6. Under section 6800, Revised Codes, the ministerial act of the clerk of the district court of recording a general verdict constitutes the rendition of judgment, the drawing of a formal judgment and signing thereof by the judge not being essential to its validity.

Same—Special Verdicts—Special Findings.

7. Where in an action at law the court directs the jury to return a special verdict or special findings, it is its duty to render the proper judgment in open court, the announcement of its decision and the entry of it in the minutes constituting the rendition of the judgment.

Same—Equity Cases—What Constitutes Judgment.

8. In equity cases, if the decision of the court is general or the findings are not accompanied by conclusions of law embodying specific directions as to the adjustment of the rights of the parties, the clerk cannot enter judgment until its terms have been finally

fixed by the court, after which its entry, in conformity with such directions, constitutes the judgment of the court, though not signed by the judge.

Same—Signing of Judgment in District Other Than That in Which Trial Had—Effect.

9. Since, under the rules above, the drawing of a formal judgment in an action to recover damages for death caused by negligence in which the trial judge directed a verdict for defendants, and signing thereof by the judge, were not essential to the validity of the judgment, after entry by the clerk, the fact that he did sign it at chambers in his own district, whereas the action was brought and the trial had in another district, did not render the judgment void.

(MR. JUSTICE COOPER dissenting.)

Appeal from District Court, Silver Bow County, in the Second Judicial District; Theodore Lentz, a Judge of the Fourth District, presiding.

ACTION by Muriel McIntyre against the Northern Pacific Railway Company, William T. Finnegan and others. From a judgment in favor of the defendants named; and an order denying a new trial, plaintiff appeals. Affirmed.

Mr. N. A. Roterling, for Appellant, submitted a brief and argued the cause orally.

There were two contested questions before the trial court:

(a) As to whether or not Engineer Lawrence, or any of the defendants, saw the child standing upon the railway company's right of way in time sufficient in which he, or they, in the exercise of ordinary care, could have brought the engine to a stop without injuring the child; in other words, whether or not the last clear chance doctrine applies. If the evidence was conflicting in any particular, as we contend, that was a question for submission to the jury and not a question of law for the court. (*Adams v. Coon*, 36 Okl. 644, 44 L. R. A. (n. s.) 624, 129 Pac. 851; *Chickasha Inv. Co. v. Phillips* (Okl.), 161 Pac. 223, 224; *Lane v. Choctaw, O. & G. Ry. Co.*, 19 Okl. 324, 91 Pac. 883; *Taylor v. Insurance Co. of North America*, 25 Okl. 92, 138 Am. St. Rep. 906, 105 Pac. 354; *Midland Sav. & L. Co. v. Sutton*, 30 Okl. 448, 120 Pac. 1007; *Gamble v. Riley*, 39 Okl. 363, 135 Pac. 390; *Mod-*

ern Brotherhood of America v. Beshara, 42 Okl. 684, 142 Pac. 1014; *Schlegel v. Fuller*, 48 Okl. 134, 149 Pac. 1118.) The case made by the plaintiff was stronger than was plaintiff's case in *Doichinoff v. Chicago, M. & St. P. Ry. Co.*, 51 Mont. 582, 154 Pac. 924.

(b) As to whether or not the evidence conclusively shows that the plaintiff was guilty of contributory negligence in allowing the boy to leave her home and go to the passenger depot on December 10, 1915. The boy was ten years old. The plaintiff was a widow, doing whatever work she was able to obtain. Cooking, housework and anything else to be done in private families, usually constituted her occupation. That she was not guilty of contributory negligence, see *Dahl v. Milwaukee City Ry. Co.*, 62 Wis. 652, 22 N. W. 755, 756; *Cameron v. Duluth-Superior Traction Co.*, 94 Minn. 104, 102 N. W. 208; *Quinn v. City of Pittsburgh*, 243 Pa. 521, 90 Atl. 353; *Pennsylvania Ry. Co. v. Brooks*, 2 Walk. (Pa.) 122; *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah, 428, 37 Pac. 681; *Grant v. Bangor Ry. & Electric Co.*, 109 Me. 133, 83 Atl. 121, 123. In the last preceding case there was a recovery for injuries sustained by a child five years and three months old. (See, also, *Harrington v. Butte etc. Ry. Co.*, 39 Mont. 299, 102 Pac. 330.)

The first ground of the motion for an order directing a verdict in favor of defendants states that the complaint fails to state a cause of action. We say that the complaint does state a cause of action. It is sufficient under the Montana cases. (*Melzner v. Northern Pacific Ry. Co.*, 46 Mont. 182, 127 Pac. 146; *Doichinoff v. Chicago, M. & St. P. Ry. Co.*, *supra*.) In addition to these questions one other presents itself to this court, *viz.*, whether or not, when, as here, a case is tried by a substitute judge, that judge can sign, give, grant and render a judgment in the case when he is no longer within the judicial district in which he tried the case to a verdict, there being no stipulation of the parties with reference thereto. We contend he cannot. (*In re Harmer*, 47 Kan. 262, 27 Pac.

1004; *Atlantic Coast Line R. Co. v. Moise*, 85 S. C. 530, 67 S. E. 785, 786; *Badham v. Brabham*, 54 S. C. 400, 32 S. E. 444; *People ex rel. Board etc. v. Hebel*, 19 Colo. App. 523, 76 Pac. 550; *Hodgin v. Whitcomb*, 51 Neb. 617, 1 N. W. 314; *Dalton v. Libby*, 9 Nev. 192; *Conover v. Wright*, 3 Neb. (Unof.) 211, 91 N. W. 545; *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753, 23 Cyc. 550, 677.)

Messrs. Gunn, Rasch & Hall and *Messrs. Walker & Walker*, for Respondents, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

There is no substantial evidence to prove that the switch crew saw the boy in a position of peril and thereafter wantonly and willfully ran over him. Plaintiff failed to prove what is necessary, under the rule announced by this court in the case of *Dahmer v. Northern Pacific Ry. Co.*, 48 Mont. 152, 136 Pac. 1059, 142 Pac. 209.

Counsel for plaintiff quote from the case of *Doichinoff v. Chicago, M. & St. P. Ry. Co.*, 51 Mont. 582, 154 Pac. 924. One of the vital and necessary conditions mentioned in the quotation from that case is "that the view from the locomotive was entirely unobstructed." That is the circumstance not found in this case. On the other hand, it stands undisputed that a large and complete obstruction of one's view for a distance of over one hundred feet west of the tender did exist here.

The court, under the rule announced in *Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458, was warranted in directing a verdict for defendants.

In *Bean v. Missoula Lumber Co.*, 40 Mont. 31, 104 Pac. 869, the court said: "But when the evidence is clear and satisfactory, and of such character that, if it should be submitted to the jury and a verdict be rendered contrary to it, the court would be required to set the verdict aside, then the court may direct a verdict." The evidence in this case was in such condition that it would have been the duty of the court to set aside a

verdict for plaintiff if one had been so rendered by the jury, and, therefore, under the above authorities it was his duty to direct a verdict.

The evidence for the plaintiff in the *Dakmer Case* and the *Escallier Case* was stronger and entitled to more credit than that of the plaintiff in this case, and the court held a directed verdict should have been granted in the former and sustained a nonsuit in the latter. That a directed verdict was proper under the facts disclosed and the positive evidence of the switch crew that they did not see the child in a perilous situation, see, also, *Palmer v. Oregon Short Line Ry. Co.*, 34 Utah, 466, 16 Ann. Cas. 229, and note, 98 Pac. 689; *Dorsey's Admx. v. Louisville & N. R. Co.*, 26 Ky. Law Rep. 232, 80 S. W. 1131.

One of the defendant's grounds for a directed verdict was that the plaintiff was guilty of contributory negligence in allowing the boy to go into the yards of the defendant. Counsel for plaintiff quotes extracts from the evidence as to the care and precaution plaintiff took with her boy. It is immaterial what general care she may have taken or what general instructions she may have given him, if, on this occasion, she knowingly permitted him to go alone into a known place of danger.

This case is distinguishable from cases like that disclosed by the evidence at the second trial of *Harrington v. Butte etc. Ry. Co.*, 39 Mont. 299, 102 Pac. 330, where the court said the evidence showed that the parent had cautioned the child and exercised due care over it, and where the child in spite of such precautions and without the parent's knowledge or permission thereafter went into a place of danger. This distinction is shown in the cases cited in the note to *Harrington v. Butte etc. Ry. Co.*, 16 L. R. A. (n. s.) 395. The case of *Vinnette v. Northern Pacific Ry. Co.*, 47 Wash. 320, 18 L. R. A. (n. s.) 328, and note, 91 Pac. 975, is squarely in point. (See, also, *Conway v. Monidah Trust*, 52 Mont. 244, 157 Pac. 178.)

If the matter of signing the judgment by Judge Lentz at Missoula was an irregularity, which we deny, it was not an irregularity in the proceedings of the court, jury or adverse party, or an order of the court, which prevented plaintiff "from having a fair trial." It has nothing to do with the fairness of the trial, and, therefore, it cannot be raised under subdivision 1 of section 6794, Revised Codes, and it certainly is not covered by any other provision found therein. (Hayne on New Trial & Appeal (Rev. ed.), secs. 1, 24-26 *et seq.*)

The minutes of the court of Silver Bow county show that the case was decided and judgment rendered by Judge Lentz in that county by granting defendants' motion for a directed verdict, and the verdict rendered is incorporated in such minute entry. This was a final determination of the rights of the parties in the action, as defined in section 6710, Revised Codes. The entry or signing of a formal judgment, based on such verdict, was a ministerial act of the court. (*Parrott v. Kane*, 14 Mont. 23, 35 Pac. 243; *State ex rel. Dolenty v. District Court*, 42 Mont. 170, 111 Pac. 731.) Judgment is entered by the clerk in cases tried by a jury. (Sec. 6800, Rev. Codes.) The custom of drawing a formal judgment and having it signed by the judge is simply a matter of practice, but it is not required by any statute. The signature of the judge is not essential. (*State ex rel. Dolenty v. Reece*, 43 Mont. 291, 115 Pac. 681; *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; *Broder v. Conklin*, 98 Cal. 360, 33 Pac. 211; *In re Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431; *City and County of San Francisco v. Brown*, 153 Cal. 644, 96 Pac. 281; Spelling on New Trial & Appellate Practice, sec. 485.)

We find nothing in the case of *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753, cited by appellant, or in *Eustance v. Francis*, 52 Mont. 295, 296, 157 Pac. 573, which indicates that a judge who had gone into another district and there heard and decided a case could not legally sign a formal judgment upon his return home, the same as

a judge who had tried a case in his own district would sign it in chambers when presented by counsel, which is the daily practice throughout the state. As we interpret these two cases, this would be one of the things they hold that a judge could do upon returning to his own district after he has acquired jurisdiction of and actually tried and finally determined the case in the county to which he had been called.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiff seeks to recover damages for the loss she sustained by reason of the death of her son, Freddie Lautwe, which is alleged to have been caused by negligence in the operation of a switch-engine of the railway company by its employees in its yard at Butte. Defendants Lawrence and Williams, respectively the engineer and fireman in charge of the engine, were not served with summons, and therefore were not parties to the trial. At the conclusion of the evidence the court, on motion of the railway company and defendant Finnegan, directed a verdict in their favor. Plaintiff has appealed from the judgment entered thereon, and from an order denying her a new trial. Counsel contend that the court erred in withdrawing the case from the jury.

McIntyre v. Northern Pacific Ry. Co., 56 Mont. 43, 180 Pac. 971, was an action by the plaintiff herein as administratrix of her son, to recover damages for the benefit of his estate. The complaint in that case was drawn, and the trial was had upon the theory that recovery could be had, if at all, under the rule of the last clear chance. The complaint in this case is identical with that in the other, and the trial was had upon the same theory. The plaintiff undertook to establish her right to recover in this case, by evidence which was the same in all substantial particulars as that introduced by her in the other case, with this exception: At the trial in the other case she testified that she was present in the yard at the time of the accident and witnessed it. She pointed out

the place where she was standing. She also pointed out where her son was standing on the track when the engineer started to move the engine toward him, giving the distance before it reached him and ran him down. At the trial of this case she changed her testimony as given on the other trial, by putting herself at a point where she was much nearer the engine when it began to move, and fixing the point at which her son stood much farther from the engine, thus bringing herself relatively nearer to the engineer, in order to increase by her testimony the probability that the engineer saw her son in ample time to stop the engine before it reached him. She explained this change in her testimony by saying that at the other trial she had not measured these distances, but had only estimated them, whereas after the trial she had procured the services of a competent engineer and had them accurately measured. Reference to the epitome and analysis of the evidence made in the opinion in the other case will make it clear that the change in her testimony did not add materially to the evidentiary value of her narrative as then made. The discussion in that opinion fully covers and disposes of every phase of the evidence in this, under the rules of law applicable, and we are satisfied with the result reached. It is conclusive of this case.

It may be added that the defendants introduced several witnesses whose testimony was not introduced at the trial of the other case. Their testimony strongly impeached that of the plaintiff, in that it tended to show that she was not at the point where she said she was standing at the time of the accident, and that she was either mistaken in important particulars of her narrative, or that her statement that she was present in the yard and witnessed the accident was a fabrication. Conceding for the moment that her statement furnished the basis for an inference that the engineer actually saw the boy, in view of the change in her testimony, the positive statement of the engineer that he did not see the boy and the undisputed evidence, positive and circumstantial, of

other witnesses introduced by the defendants, impeaching her testimony throughout, as pointed out in the opinion in the other case, the evidence as a whole was insufficient to justify a recovery.

If the pleadings had been formulated on the theory that because of the situation of the yard and customary [1] use of it by those who lived in the vicinity and other members of the public by acquiescence of the railway company, its duty to take knowledge of their probable presence and to keep a lookout for them during the movement of its train would have been made apparent, and a different case would have been presented. The evidence might then have made a case calling for the judgment of the jury. The rules by which cases of that character are determined have no application here. In that class of cases it is the duty of the company to keep a lookout in order to avoid injury to persons who may be in the way of its trains. (*Dahmer v. Northern Pac. Ry. Co.*, 48 Mont. 152, 136 Pac. 1059, 142 Pac. 209; *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.) In cases of the class of the instant case the company is under no duty other than to avoid injury to persons who may be in the way of its trains after their presence and peril have actually been discovered. (*Dahmer v. Northern Pac. Ry. Co.*, *supra*, and cases cited.)

Construing the evidence from the aspect of it most favorable to the plaintiff, it presents nothing more than a scintilla [2] tending to show that the engineer actually observed the boy on the track. In *Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458, it was pointed out that it requires more than this to call for the judgment of a jury. The principle of that case applies here.

Honorable Theodore Lentz, of the fourth judicial district, presided at the trial, having been requested to do so by [3-8] Honorable John B. McClernan, the resident judge, in whose department the case was pending. After the verdict was rendered, but before judgment had been entered, Judge

Lentz returned to his own district. A few days later a formal judgment was presented to him by counsel for defendants at Missoula for his signature. After he had signed it, it was transmitted to the clerk of the district court in Silver Bow county, and by him duly entered. Counsel for plaintiff contend that, since Judge Lentz did not formally render judgment in open court in Silver Bow county, the judgment is void. It is true that a judge cannot at chambers, after leaving the district in which he has presided at a trial, render judgment therein or make any order other than he is authorized by statute or by agreement of the parties. (*State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753.) Indeed, he is without jurisdiction while he is in his own district to do anything at chambers, in relation to cases pending there, other than what the statute authorizes. (*State ex rel. Mannix v. District Court, supra*; 23 Cyc. 550.) The rendition of a judgment is a judicial act which, to be valid, must be rendered in open court. Section 6800 of the Revised Codes declares: "When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings." Under this provision, the return and recording of a general verdict makes it the ministerial duty of the clerk to enter judgment. In other words, the recording of the verdict under the direction of the court is the rendition of judgment. Thereafter the court has no other function to perform with reference to it, unless it has ordered the case to be reserved for argument or further consideration, or granted a stay of proceedings. The custom of drawing a formal judgment and having the judge sign it is usually observed; but this is not required by the statute. The signature of the judge is not essential to its validity. (*State ex rel. Dolenty v. District Court*, 42 Mont. 170, 111 Pac. 731; *State ex rel. Anderson v.*

District Court, 56 Mont. 244, 184 Pac. 218; *Spelling on New Trial & Appellate Practice*, sec. 485.)

It is otherwise when the court directs the jury to return [9] a special verdict or special findings. When the special verdict or findings are returned, it is the duty of the court to render the proper judgment. (*McDonald v. Klenze*, 52 Mont. 142, 157 Pac. 175.) "There is this difference between a general and a special verdict: The former includes, or rather unmistakably implies, the conclusion of law constituting a judgment, while the latter answers the purpose of findings by the court, but lacks the conclusion of law which accompanies findings made by the court. Therefore, in cases of special verdicts, the clerk has no guide for entering the judgment until the court has declared the conclusion of law; that is, directed what judgment shall be entered." (*Spelling on New Trial & Appellate Practice*, sec. 485.) When this is the situation, the rendition of judgment, being a judicial act which remains to be done, must be performed by the judge in open court. The announcement of his decision by the judge in open court and the entry of it in the minutes constitute the rendition of the judgment. The equity cases, if the decision is general or the findings are not accompanied by conclusions of law embodying specific directions as to the adjustment of the rights of the parties, the clerk has no authority to enter the judgment. In assuming to do so, he assumes to perform judicial functions, whereas his duty in this respect is ministerial. He may not act at all until the terms of the judgment have been finally fixed by the court. (*State ex rel. Reser v. District Court*, 53 Mont. 235, 163 Pac. 1149.) When this has been done, however, the clerk's duty is clear. When entered in conformity with the direction of the court, the judgment is the judgment of the court, though not written out and signed by the judge.

The signing of the judgment in this case by Judge Lentz at Missoula was therefore not necessary to authorize the clerk

to enter the judgment. The contention of counsel is without merit.

The judgment and order are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. JUSTICE COOPER: The evidence in this case not differing materially from that presented in *McIntyre v. Northern Pac. Ry. Co.*, 56 Mont. 43, 180 Pac. 971, I feel compelled to dissent upon the ground that in my judgment the evidence was sufficient to call for a submission of it to the jury.

LAGIER, RESPONDENT, v. LAGIER, APPELLANT.

(No. 4,165.)

(Submitted June 3, 1920. Decided July 6, 1920.)

[193 Pac. 393.]

Divorce—Evidence—Sufficiency—Remarriage After Divorce—Effect—Irrelevant Testimony—Presumptions.

Divorce—Evidence—Sufficiency—Review—Rule in Equity Cases.

1. Where, in a divorce proceeding, the trial court made no specific findings of fact but rendered a general decree in favor of plaintiff to the effect that all three charges alleged in her complaint were true, and the evidence was sufficient to sustain the court's view as to one of such charges, the supreme court will not interfere on appeal, even though as to the other two the proof could properly be said to preponderate against its decision.

Same—Remarriage—Effect—Jurisdiction of Supreme Court.

2. Since the supreme court has no original jurisdiction in divorce proceedings, it cannot reverse a decree in such a case on the ground that after its rendition, and before defendant had perfected his appeal, plaintiff had remarried,—a fact, made to appear by stipulation on appeal, the legal effect of which could not have been before the trial court when it rendered its decree.

Same—Laxity of Divorce Laws—Remedy.

3. The remedy for laxity of divorce laws lies with the legislative, not the judicial, branch of government.

Equity—Admission of Irrelevant Testimony—Presumptions.

4. In an equity case tried to the court, it will be assumed on appeal that incompetent and irrelevant testimony admitted during the course of the trial was disregarded by it in arriving at its decision.

*Appeals from District Court of Lewis and Clark County;
R. Lee Word, Judge.*

ACTION for divorce by Andree C. Lagier against Louis Lagier. Judgment for plaintiff. Defendant appeals from it and an order denying his motion for a new trial. Affirmed.

Mr. C. A. Spaulding, for Appellant, submitted an original and supplemental brief, and argued the cause orally.

Mr. Park Smith, for Respondent, submitted a brief, and one in reply to appellant's supplemental brief, and argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

This is an action for divorce based upon three grounds: Desertion, willful neglect, cruel and inhuman treatment, in that defendant has falsely and repeatedly uttered and published charges against the chastity of plaintiff. The answer generally denies the allegations of the complaint and alleges that defendant has furnished plaintiff a suitable home but that plaintiff has failed and refused to live with the defendant and without cause has deserted him; that plaintiff has been guilty of conduct which has been of such a nature and character as to render the continuance of the marriage relation between defendant and plaintiff perpetually unreasonable and intolerable, thus defeating the legitimate objects of marriage; that defendant has been and is willing and ready to furnish plaintiff a suitable home if she will reside with him, but that she still refuses and fails so to do. There was reply. The trial court made no specific findings of fact, but rendered a general judgment in favor of the plaintiff to the effect that all the charges in the complaint were true,

granting a divorce to plaintiff. The appeal is from the judgment and an order denying a motion for a new trial.

Briefly stated, the testimony discloses that the father of the plaintiff had come to this country from France and was a friend of the defendant; that plaintiff's father told the defendant of his daughter, who still resided in France, and defendant advanced money for the purchase of a ticket for the purpose of bringing her from France to Helena, and that a few days after her arrival, without previous acquaintance, they were married on the fourteenth day of March, 1915, and that at a party or dance, held in honor of the marriage, immediately following the ceremony, the parties quarreled, the plaintiff alleging that he then charged her with being too intimate at the dance with one Croteau. There is also testimony that upon several occasions the defendant, in the presence of others, made statements to the effect that plaintiff was more the wife of Croteau than of himself; that "she was a very bad woman" and should be sent to the penitentiary; that "she has four or five husbands—was Croteau's wife." The parties lived together from the fourteenth day of March, 1915, to the eighteenth day of March, 1915, when defendant left for the ranch where he was employed, leaving her in town. On the twenty-ninth day of March she went to the ranch and remained there until the second day of April following. There is also evidence that during her stay at the ranch, they did not cohabit as husband and wife, and that they had trouble while there; that the place of abode furnished by the defendant was not suitable as a dwelling. This testimony is controverted by the defendant. He testified that plaintiff, by reason of her relations with Croteau, refused to make her home with him, and some testimony was offered by the defendant showing what he claimed the course of conduct pursued by her with Croteau.

The testimony in the case was given largely through the aid of an interpreter and the record is therefore not as clear as may be desired; but the trial court was in a more advan-

tageous position than we are to determine the weight of the evidence. We think no useful purpose may be served in [1] attempting to set it forth in detail. Whether it preponderates against the view of the district court as to desertion and neglect of the plaintiff by defendant, it is not necessary for us to determine, for as to the third cause of action we are unable to say that it preponderates against the rulings appealed from, and therefore, following the principle so often announced by this court, we will not disturb the judgment.

By a stipulation filed after the appeal was perfected, it is [2] made to appear that after the decree of the district court, and before the appeal was perfected, the plaintiff remarried. Because of this, defendant contends that the decree should be reversed and the action dismissed. In support of this position appellant cites the case of *Branch v. Branch*, 30 Colo. 499, 71 Pac. 632. There, however, the court on appeal held that the testimony did not support the trial court's finding as to neglect of the plaintiff by the defendant for the statutory period, and directed the dismissal of the cause upon that ground. Upon rehearing it was made to appear that plaintiff had remarried during the pendency of the appeal. The court held that the appeal suspended the judgment for all purposes, and that she could not lawfully remarry during the pendency of the appeal, and that where one of the parties to a divorce remarries during the pendency of the appeal, that party has not the right to prosecute or defend, and could not question the correctness of a decision of the supreme court in a petition for rehearing. It should be borne in mind also that in that case the court had found that plaintiff was not entitled to a divorce, and that therefore a new trial could serve no useful purpose, and for that reason a dismissal was directed.

We are not unmindful of the all too prevalent custom of parties to divorce actions marrying again after divorce, during the period when a motion to vacate the judgment may be made, or within which an appeal may be taken. In this

case, however, we are not called upon to determine plaintiff's status since her remarriage. We have no original jurisdiction in divorce actions. We can only review the correctness of the trial court's rulings. That court may not be put in error because of the existence of facts occurring after the decree had been rendered, and which it was impossible for that court to pass upon when the cause was submitted to it. To pass upon and determine the legal effect of matters of fact, not presented to the trial court, would require this court to assume original jurisdiction of litigation, which original jurisdiction is intrusted by the Constitution solely to the district courts.

The question raised differs from that in the Colorado case, as the remarriage here occurred prior to the appeal being taken. Whether that marriage is or is not a valid one is not before us for consideration. Others than the plaintiff and defendant in this action are concerned in that situation. We cannot conclude rights of parties who are not parties to [3] litigation pending before us. The laxity of divorce laws has been the subject of much comment and adverse criticism. The remedy, however, lies with the legislative branch of government, not with the courts, which have no authority to enact laws.

Objections were made to the reception of evidence, which [4] objections were overruled and error is assigned upon the rulings. This being a trial to the court, we will assume that the court disregarded any incompetent or irrelevant testimony.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

STATE EX REL. KEILEY ET AL., RELATORS, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 4,599.)

(Submitted June 4, 1920. Decided July 6, 1920.)

[191 Pac. 519.]

Contempt—Water Rights—Evidence—Sufficiency—Supervisory Control.

Contempt—Supervisory Control—Extent of Review.

1. On writ of supervisory control to review an order finding relators guilty of contempt for violation of a decree adjudicating water rights, attacked on the ground of the insufficiency of the evidence to sustain it, the supreme court can only determine whether the district court, acting within jurisdiction, had before it substantial evidence to support the order, its weight and the credibility of the witnesses being matters within the exclusive province of that court.

Same—Evidence—Sufficiency.

2. *Held*, that the district court had before it substantial evidence warranting it in finding that the claim of relators that they had developed a new supply of water having no connection with the stream for interfering with adjudicated rights in the waters of which they were adjudged guilty of contempt, was without merit.

(MR. JUSTICE HOLLOWAY, dissenting.)

Original application for writ of supervisory control by the State of Montana, on the relation of Edward B. Keiley and others, who had been adjudged to be in contempt, against the District Court of the Third Judicial District for the County of Powell, and George B. Winston, the Judge thereof. Order to show cause quashed, and proceedings dismissed.

Mr. J. A. Walsh, for Relators, submitted a brief and argued the cause orally.

Mr. S. P. Wilson and *Mr. E. J. Cummins*, for Respondent, submitted a brief; *Mr. Wilson* argued the case orally.

MR. JUSTICE COOPER delivered the opinion of the court.

On November 20, 1911, in a case entitled *David J. Coughlin et al.*, Plaintiffs, vs. *Mary V. Hoepfner et al.*, Defendants,

a judgment was rendered in the district court of the third judicial district in and for Powell county, adjudicating all the rights in the waters of Nevada Creek and its tributaries in that county to the parties therein, and awarding to each the use of a specific number of inches of such waters. To this decree the predecessors in interest of the relators were parties. By affidavit of date September 2, 1919, relators were charged with opening the headgate of their ditch leading out of Nevada Creek, and causing to flow upon their lands, and to irrigate the same, more than fifteen inches of water to which they were not legally entitled, against the order of the court and in violation of the decree rendered and entered therein. Upon their plea of not guilty a hearing was had in open court, a judgment of guilty rendered, and a fine of \$50 assessed against them. Upon the assumption that the judgment was without sufficient evidence to sustain it and to have it annulled, this proceeding was instituted.

The evidence on behalf of the prosecution tended to show [1,2] that on August 29, 1919, fifteen inches of water were flowing through the headgate and ditch of relators and out upon their land; that the water so diverted came out of the natural channel of a slough tributary to, and a part of, the normal flow of the waters of Nevada Creek; that relators knew that prior appropriators were entitled to, and in need of, all the water flowing therein; that the water commissioner, acting under the orders of the court pursuant to the decree in the original case, when the waters of Nevada Creek began to materially diminish in quantity—about the 7th of July—turned all of it out of the ditch mentioned, and into the ditches of persons having rights prior in time and superior to those of relators. Defendants below asserted no right to the waters of Nevada Creek proper prior to that of the parties receiving the water from the water commissioner, but did claim, and by the testimony sought to prove, that, by reason of the development of the fifteen inches mentioned, the natural source of which is a spring or slough having no connection with Nevada

Creek or in any wise dependent thereon, they are legally entitled to it, and therefore not properly chargeable with the offense upon which their conviction stands. To the judgment of the district court was confided determination of this disputed question of fact. That court decided against the contention of relators and adjudged them guilty of contempt as charged.

The evidentiary facts and circumstances were sufficient in weight to convince the trial court of the truth of the charge beyond a reasonable doubt. With that conclusion it is not our privilege to interfere; for every court is the exclusive arbiter of its own contempt, the point of jurisdiction and the legality of its exercise being the only questions subject to review. It was within the province of the trial court to entirely disbelieve the testimony of the defendants to the effect that they did not divert any of the waters as charged. Categorical denials may not destroy a conviction founded upon substantial evidence, nor prevent the deduction of inferences the court can properly draw. In *State ex rel. Zosel v. District Court*, 56 Mont. 578, 185 Pac. 1112, too, the defendants claimed a new and different source of supply from that adjudicated in the original case. That contention was there repudiated by the district court, and the proceedings under petition for writ of supervisory control were ordered dismissed by this court. Upon the authority of that case this writ must stand or fall. Further discussion would add nothing to judicial precedent.

The motion to quash the order to show cause issued herein is therefore sustained and the proceedings are dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and MATTHEWS concur.

MR. JUSTICE HOLLOWAY: A contempt proceeding is essentially criminal in character, and is subject to the rules of evidence applicable to criminal cases; that is to say, the character and *quantum* of proof are determined by the same

standards in a contempt proceeding as in any criminal case. To justify a judgment imposing punishment for contempt, the evidence must establish the contemnor's guilt beyond a reasonable doubt. (*State ex rel. Boston & Mont. Co. v. Judges*, 30 Mont. 193, 76 Pac. 10.) It is true that the evidence which tends to establish guilt need not be direct. It may be circumstantial; but, if circumstantial evidence is relied upon, then the rule by which the sufficiency of the evidence is to be determined is too well settled to admit of controversy. It has been stated by this court repeatedly as follows: "When a conviction is sought upon circumstantial evidence, the circumstances proved must be consistent with each other and with the hypothesis of defendant's guilt, and at the same time inconsistent with any rational hypothesis other than that of his guilt." "Circumstantial evidence, to warrant a conviction of crime, must be of a conclusive nature and tendency, leading, on the whole, to a satisfactory conclusion, and producing a reasonable and moral certainty that the accused, and no one else, committed the crime charged." (*State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Sieff*, 54 Mont. 165, 168 Pac. 524; *State v. Riggs*, 56 Mont. 393, 185 Pac. 165.)

The evidence produced against the accused upon the hearing of this proceeding is wholly circumstantial and, in my opinion, falls far short of meeting the requirements of the rule above. At most, it does not do more than create a suspicion that the accused were the persons responsible for the water being used in violation of the decree, and that is not sufficient. This court is committed to the doctrine that "A defendant may not be convicted on conjectures, however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes guilt beyond a reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true." (*State v. Mullins*, 55 Mont. 95, 173 Pac. 788.)

STATE EX REL. RANKIN, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,641.)

(Submitted May 24, 1920. Decided July 9, 1920.)

[191 Pac. 772.]

Certiorari—Attorneys—Contempt—Judgment—Contents—Insufficiency—Power of Courts—Power of Legislature—Record.

Contempt—Attorneys—Judgment—Insufficiency.

1. *Held*, on *certiorari*, that an order adjudging an attorney guilty of a direct contempt in that he had been insulting and impudent in his remarks to the court; that, though admonished a number of times not to repeat a question to a witness, he nevertheless repeated it each time; that while the court was undertaking to make remarks, it was interrupted by contemnor; and that his manner throughout the trial had been such as to bring the court in contempt and interfere with the proper administration of justice, was insufficient to meet the requirements of section 7311, Revised Codes, which provides that the court shall set out the facts—not conclusions—which occurred, from which, on review, it may be determined whether the court had jurisdiction to subject the contemnor to the payment of a fine or commit him to jail.

Same—Nature of Proceeding.

2. Proceedings in direct and indirect contempts are criminal in their nature, and the power to inflict punishment in either is inherent in the courts.

Same—Duty of Attorneys.

3. Attorneys are, in a sense, officers of the court, and upon them, above all others, rests the duty to maintain its dignity, the obligation to do so being clearly implied in the oath subscribed by them when entering the practice.

Same—Power of District Court—How to be Exercised.

4. The power of a court to punish for contempt is not an arbitrary one, but is to be exercised only when the necessity arises, and then with an intelligent discretion to serve its purpose, under the rules of procedure established by the usages of the courts or prescribed by the statute.

Same—Power of Legislature.

5. The legislature may prescribe the modes of procedure in contempt proceedings, but cannot take away or abridge the power of courts to inflict punishment therefor.

Same—Courts must Pursue Statute—Record.

6. Courts in inflicting punishment for contempt must pursue the mode of procedure prescribed by the statute, to the end that upon the record made, the contemnor may apply to the appellate tribunal for a review of the order or judgment finding him guilty.

Same—Remedies of Contemnor.

7. One adjudged guilty of a contempt of court may have the proceedings reviewed on application for writ of *certiorari* or supervisory control.

Same—Procedure—Purpose of Statute.

8. *Held*, that the purpose of section 7311, Revised Codes, providing the procedure to be observed by courts in direct contempts, is to prescribe what record must be made to evidence the legality and regularity of the proceeding.

Indirect Contempts—Record.

9. In indirect contempts, the record consists of the affidavit setting forth the facts constituting the contempt, the process, the answer of the contemnor, the evidence, and the judgment.

Direct Contempts—Record.

10. The only record made in a case of a direct contempt is the judgment, which must recite the facts showing the contemptuous words, acts or manner, its validity being tested by the recital thus made, and not by evidence supplemental thereto or by facts certified up in the return made by the judge on writ of *certiorari*, or by the record in the case on trial at the time the contempt was committed.

Contempt—Attorneys may Explain Conduct Before Court Pronounces Judgment.

11. Before an attorney is adjudged in contempt, he should be accorded an opportunity to explain or excuse his contempt and thus purge himself or show that no contempt was intended.

Certiorari by the State, on the relation of Wellington D. Rankin, against the District Court of the First Judicial District in and for the County of Lewis and Clark and R. Lee Word, a Judge thereof, to review an order adjudging relator guilty of contempt. Order annulled.

Mr. William T. Pigott, Mr. Henry Smith, Mr. C. A. Spaulding and Mr. A. P. Heywood, for Relator, submitted a brief; *Mr. Pigott and Mr. Smith* argued the cause orally.

The judgment sought to be annulled is void upon its face. It fails to state any facts showing a contempt. This is manifest from a mere inspection of the judgment, which contains the sole record before this court beyond which this court may not look. (*State ex rel. Breen v. District Court*, 34 Mont. 107, 85 Pac. 870; *In re Mettler*, 50 Mont. 299, 146 Pac. 747; see, also, *Ex parte Rowe*, 7 Cal. 175; *Ex parte Hoar*, 146 Cal. 132, 79 Pac. 853; *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372; *Cress v. State*, 14 Okl. Cr. 521, 173 Pac. 854; *Platnauer v. Superior Court*, 32 Cal. App. 463, 163 Pac. 237;

Crites v. State, 74 Neb. 687, 105 N. W. 469; *In re McCarty*, 154 Cal. 534, 98 Pac. 540.)

The court did not ask relator what, if anything, he had to say why he should not be punished for contempt. In cases of direct contempt, "the better practice seems to obtain, even in flagrant offenses of this character, of granting the contemnor an opportunity of explanation or excuse" (4 Ency. Pl. & Pr. 789), so that he may purge himself or show that no contempt was intended. The mandatory provision of section 9366, Revised Codes, that one found guilty of a crime must be asked by the court "whether he has any legal cause to show why judgment should not be pronounced against him," while perhaps by its terms not applicable to the case of a contemnor, is, by analogy, applicable to one convicted of a criminal contempt and sentenced to prison as a part of his punishment, for he is, in the eye of the law, a criminal and suffers as such.

Messrs. Day, Mapes & Loble, Messrs. McIntire & Murphy, Messrs. Gaten & Mettler, Mr. M. S. Gunn, Mr. Jas. A. Walsh, Mr. O. W. McConnell, Mr. H. S. Hepner, Mr. Jos. R. Wine and Mr. Geo. W. Padbury, for Respondents, submitted a brief; *Mr. H. G. McIntire* argued the cause orally.

The statutory provisions concerning the writ of *certiorari* are Rev. Codes, section 7202 *et seq.* Section 7206 prescribes its contents. This section, identical with section 1071 of the California Code of Civil Procedure, was evidently adopted from that state, and under a familiar rule the construction of it by the supreme court of that state was adopted also. What, then, constitutes "the *record and proceedings*?" in a case such as this? The authorities are harmonious in answer to this question. Thus in 2 Spelling on Injunctions and Other Extraordinary Remedies, second edition, section 2005, it is said: "The return must, in itself, contain a complete history of the proceedings; * * * No more of the facts need be returned than are necessary to determine upon the point of jurisdiction, or other question of law arising in the course of the proceed-

ings." And in 11 Corpus Juris, Title "Certiorari," pages 174, 175, it is said as to the contents of the return: "It must show, in a court proceeding, the rendition of a judgment. It must also disclose something on which the reviewing court can act. It should contain specific statement of facts, and not conclusions or opinions, and must be sufficient to enable the reviewing court to pass on the legality of the proceedings below." And further, in the same work on pages 176, 177: "Since the main office of the writ is to confine the actions of inferior tribunals and boards within the limits of their delegated powers, the reviewing court must re-examine their decisions on all questions on which their jurisdiction depends, whether of law or of fact. Accordingly, the evidence touching the facts on which the jurisdiction of the inferior court or tribunal depends must be returned, to enable the reviewing court to examine the same and to determine whether jurisdiction was lawfully assumed."

In the case of *Schwartz v. Superior Court*, 111 Cal. 106, 43 Pac. 580, 581, decided in 1896, which involved a review of a contempt order under the California statutes concerning contempts, which also are identical with those of Montana, our Revised Codes, section 7311, being identical with California Code of Civil Procedure, section 1211, the supreme court of that state says: "The objection that we are not at liberty to go beyond the recitals or findings in the judgment itself, in reviewing the action of the court below, is not well taken. While the writ of review is not a writ of error, and is not a means by which, as upon appeal, the mere manner of conducting the proceedings, the rulings of the court upon questions of evidence, and other matters within the jurisdiction, involving the merits, however erroneous they may be, can be reviewed, it is, nevertheless, a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, where necessary to determine the jurisdictional fact." This case was

affirmed and followed in *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, 38, decided in 1915. And the course here pursued is the same as that followed in *Platnauer v. Superior Court*, 32 Cal. App. 463, 163 Pac. 237, 240, and in *State v. Mayor of City of Butte* (Mont.), 188 Pac. 367. This being, as we submit, the established principle as to what is a proper return to a writ of *certiorari* and a contempt proceeding being reviewable only under such a writ (Rev. Codes, sec. 7322), it follows that recourse in the present instance can and should be had to all of the record as contained in the return. (See *State ex rel. Zosel v. District Court*, 56 Mont. 578, 185 Pac. 1112.)

Relator's counsel seem to rely solely on *State ex rel. Breen v. District Court*, 34 Mont. 107, 85 Pac. 870, and *In re Mettler*, 50 Mont. 299, 146 Pac. 747, as establishing a different procedure from that above set forth for contempt cases, but we find nothing in either of those cases that shows that a return such as the one in this case was there had, or, for that matter, that the point was either suggested or relied on. If, however, the contrary was intended, then we beg to remind the court that "Infallibility is to be conceded to no tribunal. A legal principle to be well settled must be founded on sound reason. Precedents are to be regarded as the great storehouse of experience, not always to be followed but to be looked to as beacon lights in the progress of judicial investigation." (*Leavitt v. Morrow*, 6 Ohio St. 71, 78, 67 Am. Dec. 334.) And "when a court comes to the deliberate conclusion that it has made a mistake, it is better * * * that it frankly acknowledge its mistake and declare the true doctrine as it should have done." (*Hines v. Driver*, 89 Ind. 339.)

Counsel for relator contend that the characterization of the order or judgment of contempt sought to be reviewed whereby the manner or demeanor of relator during the trial is stated to have been "insulting and impudent" to the court states no fact; that there is nothing in those words upon which a deduction of contempt can be predicated, and that the judg-

ment in that behalf is void. We submit that in this regard counsel for relator are in error. Referring to 13 Corpus Juris, Title "Contempt," pages 7, 8, we find it stated: "Contempt may be shown either by language or manner. Language not in itself contemptuous may become so if uttered in an insolent or defiant manner, and in determining whether the language used was or was not a contempt, regard must be had not merely to the very words used, but to the surrounding circumstances, the connection in which they were used, the tone, the look, the manner, and the emphasis." And in support of the text there is appended the following footnotes: "Thus contempt of court may be committed by innuendo and insinuation, and may consist of maliciously saying or doing anything that will have a tendency of inducing others to disregard the authority of the court. (*Gompers v. Buck's Stove etc. Co.*, 33 App. Cas. (D. C.) 516.)" (See, also, *Wilson's Case*, 7 Q. B. 984, 115 Eng. Reprint, 759, quoted with approval in *Holman v. State*, 105 Ind. 513, 5 N. E. 556, 558.) We are aware that in the *Breen Case* and in the *Mettlen Case*, *supra*, this court has apparently come to another conclusion, but in view of the fact that the intangible thing designated as manner, or demeanor, cannot be so depicted in words as to present what actually occurred, and in view of the further fact that we cannot bring ourselves to the belief that this court has advisedly done away with one of the greatest safeguards thrown around the courts in the administration of justice, *i. e.*, gentlemanly conduct on the part of all coming in their presence, we do not hesitate to request that this court reconsider the holding of said cases.

Proceedings for the adjudication and punishment of contempts are supposed to rest for their determination on the statute. A brief review of it is therefore not out of place. It is section 7311 of the Revised Codes. There is no question that the provision of the California statute is identical with this, nor can it be disputed that the courts of that state, as well as of Montana, have construed it as meaning that the

order must recite the facts constituting the contempt. But let us see as to this. When it is borne in mind that it is a matter of self-preservation, of self-defense for the courts to possess the power to maintain in the utmost degree the orderly conduct of the business transacted before them; that this power is inherent, and has been conceded as existent at all times since courts were established, it is self-evident, we submit, that any statute attempting to prescribe the manner in which the power is to be exercised must be strictly construed. Being this, where in said statute are there any words warranting the conclusion that the facts constituting the contempt must be stated in the order? The words of the statute are, "an order must be made reciting the facts as occurring in such view and presence." It is familiar law that in construing a statute all the words thereof are to be given, if possible, a proper significance—none can be omitted. The word "as" is such a word. There can be no doubt of its meaning. The lexicographers define it as meaning "at or during the time when; while; when; during; giving relations of time (as, he came while we were dining)." A further definition is, "For the reason that; it being the case that; because; since." (Standard Unabridged Dictionary.) It is an adverb, then, relating to time and place only, and so used in this statute, we submit, it makes the statute plainly mean that the order shall state the time and place of the contempt and not the facts constituting it. That this construction is in harmony with authority, see *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 36 L. R. A. 254, 45 N. E. 199.

If despite the foregoing this court should be of the opinion that there was not a full compliance with Rev. Codes, section 7311, *supra*, then the question presents itself, Is said section, at least in so far as it relates to contempts committed *in facie curiae*, and the punishment thereof, a valid exercise of the legislative branch of the government and binding on the judicial branch? In a well-considered case, also one involving a conviction for contempt of court, *Holman v. State*,

105 Ind. 513, 5 N. E. 556, 557, the court answers this question in the negative. This entire subject has been so thoroughly covered by the late cases, *e. g.*, *Carter v. Commonwealth*, 96 Va. 791, 45 L. R. A. 310, 32 S. E. 780; *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 50 L. R. A. 691, 36 S. E. 630; *Smith v. Speed*, 11 Okl. 95, 55 L. R. A. 402, 66 Pac. 511; *Chicago, B. & Q. Ry. Co. v. Gildersleeve*, 219 Mo. 170, 16 Ann. Cas. 749, and the footnotes accompanying them, that it would savor of pedantry to dwell further on it.

Opinion—PER CURIAM.

Certiorari to the district court of Lewis and Clark county to review an order adjudging Wellington D. Rankin, Esq., an attorney at law, guilty of contempt.

On May 23, 1920, during the trial of a cause entitled *The [1] State of Montana v. D. E. Rainville*, in the above-named district court, the court made and entered the following order:

“The trial of this cause was this day resumed; present J. R. Wine, Esq., county attorney, George W. Padbury, Jr., assistant county attorney for the state, and the defendant with his counsel, Wellington D. Rankin, Esq., and A. H. McConnell, Esq., and the jury. Thereupon Dr. E. D. Hitchcock resumed his testimony on behalf of the state. Thereupon Dr. B. V. McCabe was called, duly sworn, and testified on behalf of the state. Thereupon, by reason of remark of Wellington D. Rankin, Esq., counsel for the defendant, the further taking of testimony was deferred and the bailiff instructed to remove the jury from the courtroom. Whereupon the court, upon finding that counsel could not be restrained as to his remarks, the court finds that in the first part of the trial when the question came up as to the position of counsel, Wellington D. Rankin, of counsel for defendant in this case, was insulting and impudent to the court in his remarks in the presence of those in the courtroom and in the presence of the jury.

“The court holds, and so finds, that in the first part of the trial when the question came up as to the position of counsel,

Wellington D. Rankin, of counsel in this case, was insulting and impudent to the court in his remarks in the presence of those in the courtroom and in the presence of the jury.

“The court finds, and again declares, that again on yesterday three times the court had to admonish counsel that the question covered by his question had already been ruled upon by the court and it was not further necessary for him to put the questions in order to preserve his record. Three times afterward he put the same question.

“The court further finds that when a question was put by the counsel, Rankin, to the witness upon the stand, and the court was not clear from the question as to what he meant and the court made remark with reference to it, counsel was insulting and impudent to the court.

“The court further finds, and so declares, and the record will show, that three times in the course of this trial and while the court was attempting and undertaking to make remarks—remarks pertinent to the case—he was interrupted by counsel, Wellington D. Rankin.

“The court further finds, and so declares, that his manner all through has been insulting and the effect has been to lower the court in the opinion of those present, to bring the court in contempt, and to interfere with the proper administration of justice.

“Stand up, Wellington D. Rankin. The court finds you guilty of contempt, and it is the order, judgment, and sentence of this court that you be confined for 48 hours in the jail of Lewis and Clark county, and that you pay a fine of \$250, and you are remanded to the custody of the sheriff to see the sentence executed.”

Mr. Rankin, having been committed to jail, brought this proceeding to have the order annulled on the ground that it is void on the face, in that it does not recite the facts as they occurred at the time it was made, as required by the statute. On application for *habeas corpus* at the same time, the relator was admitted to bail pending final hearing.

The orders examined in the cases of *State ex rel. Breen v. District Court*, 34 Mont. 107, 85 Pac. 870, and *In re Mettler* 50 Mont. 299, 146 Pac. 747, were in form and substance the same as the one here complained of. Both of them inflicted punishment for direct contempts, under section 7311 of the Revised Codes. The one in the *Breen Case* was before this court on *certiorari*. It was declared void, the court saying of it: "The conviction here was for a direct contempt. The judgment, however, is wholly insufficient to meet the requirements of the statute. It does not contain, even by appropriate reference to the proceedings before the court, anything to show what the matters referred to as scandalous were, nor any fact tending to show what the manner of the relator was. It states conclusions and inferences only, drawn by the judge from the facts as they actually transpired, thus leaving this court no alternative but to accept these conclusions or to hold the order invalid. The purpose of the statute is to require the court to set forth the jurisdictional facts, so that the propriety of the judgment of conviction may be examined and reviewed. If adjudged sufficient as it stands, the order complained of would be conclusive upon this court, and review of it, as to the sufficiency of the facts to put the power of the court in motion, would be impossible."

The case of *In re Mettler* was an application for *habeas corpus*. The complainant was held entitled to his release on the ground that the order was void. The court, speaking through Mr. Justice Holloway, quoted with approval the paragraph above from the opinion in the *Breen Case* as embodying the correct construction of the statute. These cases are conclusive of the insufficiency of the order in this case. The following decisions from other jurisdictions fully sustain the conclusion announced in those cases: *Ex parte Rowe*, 7 Cal. 181; *In re Shortridge*, 5 Cal. App. 379, 90 Pac. 478; *Cress v. State*, 14 Okl. Cr. 521, 173 Pac. 854; *Crites v. State*, 74 Neb. 687, 105 N. W. 469; *In re Shull*, 221 Mo. 623, 133 Am. St. Rep. 496, 121 S. W. 10; *Ex parte Hoar*, 146 Cal. 132, 79 Pac. 853;

In re Coulter, 25 Wash. 529, 65 Pac. 759; *State v. District Court*, 124 Iowa, 187, 99 N. W. 712. Relator is therefore entitled to have the order annulled.

Counsel for respondents insist, however: (1) That, though the facts are defectively stated in the order, sufficient are stated to uphold it, and if not, (2) that reference may be made to the portions of the evidence in the case of *State v. Rainville*, certified in the return to the writ, to ascertain what was said and done prior to and at the time the order was made, for the purpose of upholding it. Neither of these contentions can be maintained. In answer to the first, a very brief notice of the order will be sufficient. In the first paragraph preceding the adjudging portion of the order, which does not purport to state any facts, the court "finds" that during the first part of the trial "when the question came up as to the position of counsel" the relator was "insulting and impudent to the court in his remarks," etc. What was the position of counsel referred to? Was it one assumed by him upon some preliminary question then the subject of argument? Or did the court refer to the place in the courtroom relator presumed to occupy? What were the remarks made by him which the court deemed insulting and impudent?

In the second paragraph the court finds and declares that on the previous day during the trial it had admonished counsel three times that "the question covered by his question had been ruled upon by the court and it was not further necessary for him to put the questions in order to preserve his record," and that "three times afterward he put the same question." What was the question? To whom was it propounded? Was it propounded to a witness who was then being examined, or had it been propounded to a different one? Was it each time expressed in the same language? Did it seek to elicit testimony on the same subject to which the previous one related?

In the third it is found that counsel was "insulting and impudent" to the court while it was making remarks with ref-

erence to a question which had been put to a witness on the stand, the meaning of which was not clear. Of what did the insult and impudence consist? Was it manifested by word or act, or both? Or did it consist of the manner of counsel interpreted in the light of the attendant circumstances?

In paragraph 4 it is found that while the court was undertaking to make remarks pertinent to the case on trial it was interrupted by relator. Was the interruption by word or exclamation, or by some noise or movement accidentally or intentionally made by relator? How may it be determined whether the words spoken or act done was really an interruption or not? Or whether, if it was, the relator was not entirely within the limits of his duty to the defendant on trial in calling to the attention of the court some error into which it had fallen?

In the fifth paragraph the finding is that relator's "manner all through has been insulting and the effect has been * * * to bring the court in contempt and to interfere with the proper administration of justice." What was the manner of relator?

Omitting the inquiry whether the court could with propriety, at a given time during the course of the trial, assemble with what then occurred the words, acts and manner of counsel on previous days and make these combined the basis for a judgment for contempt against him, the findings, either taken separately or together, do not furnish any answer to the several inquiries which we have propounded with reference to them. In other words, as was said in the *Breen Case, supra*, the findings state "conclusions and inferences only, drawn by the judge from the facts as they actually transpired, thus leaving this court no alternative but to accept these conclusions or to hold the order invalid."

In making the second contention, counsel for respondents [2] have failed to observe the distinction between direct and indirect contempts. Proceedings in both are criminal in their nature. (*State ex rel. B. & M. etc. Co. v. Judges*, 30 Mont.

193, 76 Pac. 10; *In re Mettler, supra.*) The power to inflict punishment in either is inherent in the courts. Every court, in the very nature of things, must possess the power to protect its dignity by compelling counsel and litigants, as well as all other persons who are called into its presence or who are there merely as spectators, to observe decorous and respectful conduct, to the end that the proceedings in hand may be conducted in an orderly way. The power is designated as "inherent" because it is necessary to preserve the dignity of the judicial department of the government, and, whenever the occasion demands, must be exercised to its fullest extent to enable the court to discharge its high duty of administering justice between parties whose rights are put in issue before it, or to enforce these rights after they have been determined. Otherwise, the court is recreant to its duty and becomes an object of ridicule and contempt.

Members of the legal profession are, in a sense, officers of [3] the court, in that they enjoy the high and exclusive privilege of representing citizens who seek to have their rights determined. Upon them, above all other members of society, rests the duty to uphold and maintain the dignity of the court in which they practice. The obligation, if not embodied in express terms, is clearly implied in the oath to which they subscribe upon being granted the right to practice their profession. In consideration of the fact that they are trained in the law and are presumed to be well acquainted with the rules of procedure, as well as the extent of their rights and duties as representatives of litigants, they are held to a stricter accountability. The power is not an arbitrary one, however. [4] It is to be exercised only when the necessity arises, and then with an intelligent discretion to serve its purpose under the rules of procedure established by the usages of the courts [5, 6] or prescribed by statute. The legislature may prescribe the modes of procedure, but it cannot take away or abridge the power. Our legislature has prescribed modes of procedure and it is incumbent upon all the courts to observe them.

(*In re Mettler, supra.*) This is so because there must be such a record made that the convicted contemnor, if he chooses, may submit it to the appellate tribunal for review by appeal from the final judgment, or by other appropriate method. In this state he may do this only by invoking the writ of *certiorari* (Const. Art. VIII, sec. 3), or, in proper cases, the general supervisory power vested in this court over all the inferior courts (Const., Art. VIII, sec 2; *State ex rel. Sutton v. District Court*, 27 Mont. 128, 69 Pac. 988; *State ex rel. Coleman v. District Court*, 51 Mont. 195, 149 Pac. 973; *State ex rel. Zosel v. District Court*, 56 Mont. 578, 185 Pac. 1112). Under our form of government, a citizen may not be imprisoned or subjected to the payment of a fine by the final judgment of any one man, whether his offense is one denounced by the legislature or one for which he may be brought to the bar by the court itself in the exercise of its inherent power.

The right to exercise this power summarily in cases of direct contempt is recognized by section 7311 of the Revised Codes. The purpose of this section is to prescribe what record must be made to evidence the legality and regularity of the proceeding. It requires that "an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt," etc., in order that the jurisdiction of the court may thus be made to appear. The word "as," employed in the participial clause "as occurring," is defined generally by our lexicographers as an adverb or conjunction. (Webster's New International Dictionary; Century Dictionary.) According to the same authorities it is sometimes used also in a pronominal sense equivalent to "who" or "which." The cases of *Beasley v. People*, 89 Ill. 571, and *Kelley v. Peterson*, 9 Neb. 76, 2 N. W. 346, furnish illustrative examples. Obviously, this quality must be assigned to it here, the antecedent being the word "facts." The participial expression "as occurring" is therefore equivalent to "which occurred." If there were any doubt that this is the sense to be attributed to it, it is

removed by the later use of the term "thereby," which has reference to the word "facts"; that is, the words, or acts, or manner, any one or all of these, which form the basis of the judgment. The purpose and meaning of the provision is thus made clear. This may be illustrated further, however, by this [9] consideration: A proceeding for an indirect contempt, as provided in the same section, must be instituted by the presentation of an affidavit setting forth the facts constituting the contempt, or by a statement of them by a referee or arbitrator or other judicial officer. The contemnor must then be brought before the court by process, and held for trial or be admitted to bail, as provided in sections 7312 *et seq.* A hearing must then be had upon the answer of the contemnor, which must be conducted with all the incidents of an ordinary criminal case, except that a jury is not required. If the contemnor is found guilty the court pronounces judgment as in ordinary criminal cases, sentencing him to pay a fine or to undergo imprisonment, or both fine and imprisonment may be imposed. The judgment is then executed as in other cases. The affidavit, the process, the answer of the contemnor, and the evidence, when properly preserved, together with the judgment, constitute the record.

In a case of direct contempt, the contemnor being already [10] present in court, neither formal charge against him in writing nor process is required. The court stops the proceeding during the course of which the contempt has occurred and summarily renders judgment, imposing such punishment as it may deem proper within the limits prescribed by the legislature. No record is made other than the judgment. This, as the statute prescribes, must recite the facts showing the contemptuous words, acts or manner, as the case may be. It is then entered under its appropriate title to indicate the character of the proceeding, and this constitutes the record. If the court fails to formulate the judgment as section 7311, *supra*, prescribes, there is no record to which the appellate court may look to ascertain whether the facts "as occurring" in its im-

mediate view and presence are sufficient to form the basis of a judgment. If the contempt is committed by counsel employed in the trial of a case, or by a witness undergoing examination, so much of the evidence introduced in that case as is necessary to disclose the contempt must be recited in the judgment. If it is committed by a person not connected with the case then in hand, the facts pertinent to that case may or may not tend in any way to disclose any misconduct or breach of propriety. In other words, the pertinent facts are not disclosed by the presiding judge through the medium of witnesses, but are such as are observed by the judge himself. By his recital of them as they are known to him the record is made. The validity of the judgment is to be tested by the recital thus made, and cannot be supplemented by evidence or by facts certified up in the return by the judge. The proceeding, therefore, though taken and determined during the course of other proceedings then before the court, is distinct from the latter, and the record in the latter is no part of the record in the former. Upon *certiorari*, the judgment itself is the only record, and a certified copy of it constitutes the full return to be made to the appellate court in obedience to the writ, as prescribed by section 7206 of the Revised Codes.

In support of their contention, counsel have made an elaborate argument in their brief, and cite authorities which hold that the facts upon which the contemnor has been adjudged guilty may be certified to the appellate court to supplement the order. These authorities apply, however, to cases of indirect contempts, and are not in point here.

In their brief, counsel for the relator make the point that [11] he was not accorded an opportunity to explain or excuse his contempt and thus purge himself or show that no contempt was intended. This seems to be the better practice even in flagrant cases (4 Ency. Pl. & Pr. 789). No one should be condemned without a hearing. We cannot ascertain in this case what the facts were, and therefore express no opinion as to whether the relator was guilty. So far as we can

judge, he may have been able to satisfy the presiding judge that his conduct and manner, though apparently contemptuous, were in fact not so.

The order is annulled, and the bail bond furnished by the relator is discharged and his sureties exonerated.

Order annulled.

EDWARDS, APPELLANT, v. CITY OF HELENA, RESPONDENT.

(No. 4,661.)

(Submitted July 6, 1920. Decided July 9, 1920.)

[191 Pac. 387.]

Cities and Towns—Water Supply—Indebtedness—Constitutional Limit—Validity of Bonds—Injunction—Taxpayer's Suit—Ordinances—When not Repealable.

Cities and Towns—Water Supply—Constitutional Limit—Indebtedness—Validity of Bonds.

1. A city cannot lawfully authorize a bond issue beyond the constitutional three per cent limit for the purpose of improving its water supply, if there is a sufficient margin within that limit to secure the needed funds; but if the council either purposely or through inadvertence declares it necessary to increase the city's indebtedness beyond the limit, when in fact the necessity does not exist, the bonds authorized by a favorable vote of the electors are nevertheless valid city obligations unless the vote was procured or influenced by the deception of the voters to their prejudice.

Same—Bonds and Interest—How Payable.

2. Where a contemplated city bond issue is beyond the three per cent limit and is authorized by section 6, Article XIII, of the Constitution, the revenues of its water plant are irrevocably set aside for the discharge of the principal and interest, and a taxpayer who is not a water user cannot be called upon to contribute unless the revenues of the plant are insufficient, in which event only a property tax may be levied to supply the deficiency.

Same.

3. Where the three per cent margin of a city's indebtedness is sufficient to admit of a contemplated bond issue of the nature of the above, the bonds become the ordinary obligations of the city to be redeemed by funds derived from direct taxes upon property within its limits, unless other provisions are made for the payment of principal and interest.

Same—Water System—Disposition of Revenues.

4. If the revenues from a city owned water plant purchased by funds derived from a sale of bonds issued beyond the three per

cent limit of indebtedness exceed the amount necessary to discharge the indebtedness as it falls due, such excess is subject to disposition by the city council as other public revenues, and may be used to meet a new indebtedness created by an additional bond issue for the improvement of the system.

Same—Injunction—Taxpayer's Suit—When Dismissal Proper.

5. Where the situation of plaintiff taxpayer, in an action to enjoin the issuance and sale of municipal bonds for water supply purposes on the ground that the contemplated increase in the city's indebtedness was unauthorized because it still had a borrowing capacity within the constitutional three per cent limit, rendering the council's action in classifying the bonds as falling without the limit unnecessary, was no different from what it would have been had the council made the correct declaration in the ordinance calling a special election, he was not injured, and judgment of dismissal was proper.

Same—Ordinances—When Irrepealable.

6. An ordinance contractual in its nature, as is one in which it is agreed that if additional indebtedness in the shape of bonds should be authorized at a special election to provide for improving the city's water supply, the revenues derived from the plant would be devoted to the discharge of the indebtedness and resort to direct taxation would be had only in the event they should prove insufficient, and then only to meet the deficit, cannot, in the absence of a provision therein reserving the right of repeal, be repealed without the consent of the other party until the bonds and interest thereon are fully discharged.

[On effect of limitation of municipal indebtedness upon the acquisition of a water supply or sewer system, see note in 59 L. R. A. 604.]

*Appeal from the District Court of Lewis and Clark County;
Wm. H. Poorman, Judge.*

ACTION by Frank J. Edwards to restrain the city of Helena from issuing its water bonds. Complaint dismissed. Plaintiff appeals from the judgment. Affirmed.

Mr. A. P. Heywood, for Appellant, submitted a brief and argued the cause orally.

Mr. E. C. Day submitted a brief in behalf of Respondent and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On February 16 of this year an ordinance was passed by the city council of Helena, and approved by the mayor, directing that a special election be held on April 5 for the purpose

of submitting to the qualified electors the proposition to issue the bonds of the city in the sum of \$200,000, the money to be used to install a pipe-line to convey a portion of the city's water supply from the source near Rimini to the reservoir near Helena. The preamble to the ordinance recites that the city owns its water supply and distributing system; that the portion of the supply in question has been conveyed through an open ditch; the necessity for the proposed improvement, and the probable cost of the same; that the city has almost reached the ordinary constitutional limit (three per cent) of indebtedness; and that to procure the funds to install the pipe-line it is necessary to increase the city's indebtedness beyond the three per cent limit. In the body of the ordinance is this provision: "The revenues of said city, derived from its said water system, shall be devoted to the payment of the principal and interest on said bonds, and the city council shall hereafter provide therefor. A tax to be fixed by ordinance must be levied each year, for the purpose of paying the interest on the bonds and to create a sinking fund for their redemption." The like provision is contained in the notice of election, which was duly given, and in the ballot provided is this recitation: "Which said bonds and the interest thereon shall be paid from the revenues derived by the city from its said water system." The election was held and the bonds authorized, but before they were issued this taxpayer's suit was instituted to restrain further proceedings.

The complaint recites the history somewhat more in detail, and alleges that, notwithstanding the recital in the preamble, the city had not almost reached the three per cent limit of indebtedness, but, on the contrary, there was still a margin within that limit of more than \$300,000, an amount ample to secure the funds desired. To this complaint a general demurrer was interposed, and afterward sustained. From a judgment dismissing the complaint, this appeal is prosecuted.

It is the contention of appellant that the city could not law-
[1] fully authorize a bond issue beyond the three per cent

limit so long as there was a sufficient margin within that limit to secure the funds desired, and this will be conceded at once; but it does not follow that because the city council, either purposely or through inadvertence, declared that it was necessary to increase the indebtedness beyond the three per cent limit, the bonds authorized by the favorable vote of the qualified electors are void. They are nevertheless the valid obligations of the city, unless the favorable vote was procured or influenced by the deception of the voters to their prejudice. Assuming the allegation of the complaint to be true, and the demurrer admits it to be true for the purpose of this case, the bonds, if valid, are the obligations of the city incurred within the ordinary limit (three per cent) of its indebtedness. It is a matter of vital consequence to the taxpayer whether the bonds are within or beyond the three per cent limit. If they [2, 3] are beyond that limit, and authorized by section 6, Article XIII, of the Constitution, the revenues from the city owned water plant are irrevocably set aside and dedicated to the discharge of the interest and principal, and a taxpayer who is not a water user may not be called upon to contribute anything, unless the water plant revenues are insufficient, and then only may a property tax be levied to supply the deficiency. On the other hand, if the margin within the three per cent limit is sufficient to admit of a bond issue in the amount necessary, such bonds become the ordinary obligations of the city, to be redeemed by funds derived from direct taxes upon property within the city, unless other provisions are made for their payment and the payment of the interest as it becomes due. It is upon the theory that the property of this plaintiff and of others similarly situated will be charged with the payment of these bonds that this action is prosecuted; but, in this instance, the premise for the theory is erroneous, and the theory itself fails.

It does not appear from this record whether the city's water system was purchased by funds derived from the sale of [4, 5] bonds issued in excess of the three per cent limit, but

it is not material here. If the three per cent limit was exceeded, the revenues from the water system are set apart to the discharge of that original indebtedness only to the extent that such revenues are necessary, and any excess is subject to disposition by the city council as other public revenues of the city. (*McClintock v. City of Great Falls*, 53 Mont. 221, 163 Pac. 99.) It is not claimed in this complaint that such revenues are not sufficient to meet the original indebtedness and this new bond issue; and it follows that the excess may be employed to discharge this new indebtedness, and that, if any tax levy is ever required, it will be only such as is rendered necessary to meet a deficit. In other words, plaintiff's situation is not different from what it would have been if the declaration by the city council had been correct.

But it is insisted by counsel for plaintiff that, even though [6] the revenues from the water system are available to discharge these bonds and pay the interest as it accrues, the city council cannot be compelled to make such application, even though it has declared in the ordinance that it will do so. Speaking in general terms, that contention would be available upon the theory that the same legislative body which passed this ordinance could hereafter repeal it; but to that general rule there is this exception, which is as well settled as the rule itself, *viz.*: An ordinance contractual in nature cannot be repealed without the consent of the other party, unless the right of repeal is reserved in the original ordinance itself, for such repeal would impair the obligation of the contract. (28 Cyc. 383.) Clearly, the ordinance of February 16 is contractual in its nature and effect. By its express terms the city agreed that, if these bonds were authorized, it would devote the revenues from the water system to their discharge and resort to direct taxation only in the event such revenues were insufficient, and then only to meet the deficit. It would violate every principle of justice and fair dealing to permit the city thus to influence a favorable vote and then refuse to carry out its promise. Since the ordinance of February 16 does not re-

serve the right of appeal, our conclusion is that it is irrepealable until these bonds and interest thereon are fully discharged, and that plaintiff fails to disclose wherein he is, or can be, injured.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

POOL, RESPONDENT, v. TOWN OF TOWNSEND ET AL.,
APPELLANTS.

(No. 4,119.)

(Submitted April 12, 1920. Decided July 24, 1920.)

[191 Pac. 385.]

*Cities and Towns—Taxation—Special Improvement Districts—
Additions—Estoppel—Injunction—Judgments.*

Cities and Towns—Taxation—Special Improvement Districts—Estoppel.

1. Failure of an owner of town property to make protest to the creation of a special improvement district comprising an area of 14,000 square feet did not estop him from thereafter complaining of the inclusion of an additional area of equal extent made without his knowledge or consent, and of the proportionate increase in his tax.

Same—When Tax Void Ab Initio.

2. A special improvement tax on an addition to a town not within its limits at the time the district was created is void *ab initio*.

Same—Additions—How Accomplished—Common Law.

3. Since the Codes provide the means whereby an addition may become a part of a city or town, the means so provided are exclusive, and the method by which the same result might be reached under the common law has no application.

Same—Additions—Filing of Plat not Alone Sufficient.

4. The approval of the mayor and council of a city or town is, under section 3212 of the Revised Codes, essential to bring it within the jurisdiction of the council, the filing of the map alone being insufficient.

Same—Taxation—Injunction—Judgment Too Broad, When.

5. Where only a portion of a special improvement tax was illegal because imposed upon land not within the town limits at the time

the district was created, a judgment enjoining the collection of the entire tax, part of which was on property properly included in the district and therefore justly due, was too broad; judgment therefore modified to apply to only that portion illegally imposed.

[The question of municipal taxation of rural lands within the limits of the corporation is discussed in notes in 34 L. R. A. 193; 27 L. R. A. (n. s.) 695.]

Appeal from District Court, Broadwater County, in the Fourteenth Judicial District; R. Lee Word, a Judge of the First District.

SUIT by G. E. Pool against the Town of Townsend and B. Williams, Treasurer of Broadwater County, to restrain the collection of taxes. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Mr. Edward Horsky, for Appellants, submitted a brief; *Mr. Thos. E. Davis*, of Counsel, argued the cause orally.

The town council of Townsend intended the resolution of May 13, 1913, to be a resolution of intention, and acted upon it as such. The omission of the words "of intention" after the word "resolution," in the caption of the resolution, was at the best a mere informality, as there is nowhere any requirement in the statute that any resolution need have any title whatsoever; and none, therefore, is necessary, although it is required in the case of an ordinance. As was said by the supreme court: "A mere informality in the resolution ought not to render the effort to acquire jurisdiction nugatory and doubtless would not if the subsequent proceedings in pursuance of it were in conformity with the statute." (*Shapard v. City of Missoula*, 49 Mont. 269, 280, 141 Pac. 544.)

Notice of passage of resolution of intention was actually given by publishing, by posting, and by mailing. The mere fact that the affidavit of publication was not filed with the clerk until December 14, 1915, would not invalidate, or affect the validity of, the proceedings. The real question is whether the notice was actually published, and not whether the clerk procured the affidavit or recorded all the items that would be helpful in proving

that fact. Such provisions are directory merely. (*Marth v. City of Kingfisher*, 22 Okl. 602, 18 L. R. A. (n. s.) 1238, 98 Pac. 436.) "The very best evidence is the thing itself"—in this instance, the newspaper files. If, for example, there was an affidavit of publication on file, it would only be *prima facie*, and the newspaper files themselves are always competent to prove whether or not a certain notice thereof recited in the affidavit had been published for a given number of issues. Where service is actually made, it will be sufficient regardless of its return, or in the absence of its return (*Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624), and where proof of publication is defective, parol evidence is admissible to supply the defect. (*Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.) If the statute provides for service by mailing notices, it is sufficient if the notices are mailed, in accordance with the provisions of the statute. (*City of Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285; *People ex rel. Coffman v. Ryan*, 225 Ill. 359, 80 N. E. 279; *Elgin etc. Ry. Co. v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102; *Chicago etc. Ry. Co. v. People*, 154 Ill. 256, 40 N. E. 342; *McChesney v. People*, 145 Ill. 614, 34 N. E. 431.)

The plaintiff did none of the things which under Chapter 89, Laws of 1913, he could have done; he stood by, remained silent, and failed to appear at any time or to make any objection before the tribunal provided by law, and cannot now be heard to complain in court; and this court has held that the necessity for appearing and objecting in the manner required by the statute is a condition precedent, and must be both pleaded and proved, and that plaintiff is estopped to complain or claim any relief. (*Power v. City of Helena*, 43 Mont. 336, 342, 36 L. R. A. (n. s.) 39, 116 Pac. 415; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791; *Spalding v. Denver*, 33 Colo. 172, 80 Pac. 126; *Minnesota etc. Imp. Co. v. Billings*, 111 Fed. 972, 50 C. C. A. 70; *Brown v. Drain*, 112 Fed. 582; s. c., 187 U. S. 635, 47 L. E. 343, 23 Sup. Ct. Rep. 842 [see, also, Rose's U. S. Notes]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22;

City of Greensburg v. Zoller, 28 Ind. App. 126, 60 N. E. 1007; *Chicago & N. W. Ry. Co. v. People*, 120 Ill. 104, 11 N. E. 418; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691.)

The burden of proof was upon plaintiff to show that the taxing power was not lawfully exercised, or that there are fatal infirmities in the proceedings leading up to the tax levy. (*Parrotte v. City of Omaha*, 61 Neb. 96, 84 N. W. 602.) The actions of municipal authorities making an assessment for special improvements comes within the protection of the general maxim that public officers are presumed to have rightly acted until the contrary is clearly made to appear. (McQuillin on Municipal Corporations, sec. 2117; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458.)

That a mistake in the description of property to be included in the improvement district is not such a mistake as will affect the jurisdiction of the council in creating a special improvement district is recognized in a California case, where the court said: "The said resolution does not show on its face what the district created really was; but at all events, the matter of the size of the district is not jurisdictional." (*O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020.)

Where a city has incurred the expense of an improvement without objection and then has assessed the benefits, it is too late for a party assessed to object that the ordinance is invalid. (*Greater Newark Associates v. City of Newark*, 79 N. J. L. 331, 75 Atl. 745; *Walsh v. First Nat. Bank*, 139 Mo. App. 641, 123 S. W. 1001; *Farrington v. City of Mount Vernon*, 51 App. Div. 250, 64 N. Y. Supp. 863; affirmed, 166 N. Y. 233, 59 N. E. 826; *Rosell v. Neptune City*, 68 N. J. L. 509, 53 Atl. 199; *Haughawout v. Raymond*, 148 Cal. 311, 83 Pac. 53; *City of New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181, 51 Pac. 360.)

A property owner is estopped from enjoining the collection of excessive installments of an assessment to pay for a public improvement, where he has voluntarily paid the first installment thereof and watched in silence the letting of the contract

and the completion of the improvement, and has accepted all the benefits thereof. (*Stewart Co. v. City of Flint*, 147 Mich. 697, 111 N. W. 352; *People v. Raymond*, 248 Ill. 124, 93 N. E. 727; *McDonald v. People*, 206 Ill. 624, 69 N. E. 509.)

Mr. E. H. Goodman, for Respondent, submitted a brief.

“The due publication of these notices (notice of intention to establish a road) was the only means by which the county court could acquire jurisdiction of the matter, and, the record failing to show that the method prescribed by statute had been pursued, it never acquired jurisdiction to make the order declaring the proposed road a public highway.” (*Cameron v. Wasco County*, 27 Or. 318, 41 Pac. 160.) “In cases of this nature, where public officers are proceeding summarily to deprive the owners of their land, jurisdictional facts must be distinctly shown, and are not to be made out by a general averment, which amount to no more than a statement that the law has been complied with.” The records must show the facts so that we may see whether the law was complied with or not. (*Dupont v. Highway Commrs.*, 28 Mich. 362.) The rule with respect to courts of special and limited authority is that their jurisdiction is never presumed, but must affirmatively appear by sufficient evidence and proper averment in the record. (17 Am. & Eng. Ency. of Law., p. 1082.) “Proof of the publication or posting of any notice provided for herein shall be made by affidavit of the owner, publisher, printer or clerk of the newspaper, or the poster of the notice.” (Subd. 4, Chap. 9, Laws 1913.) That the records and files of the town council failed to show these facts is uncontradicted, and is admitted by the testimony of the clerk of the town.

The admission of the oral testimony of T. N. Averill of the publication and mailing of the notices, over the objections of the plaintiff, was erroneous, in that it was an attempt to prove the official acts of the town council by parol testimony. (Sec. 7896; subd. 5, sec. 7924, Revised Codes; *Stephens v. Nacey*, 49 Mont. 230, 141 Pac. 649.)

judge, he may have been able to satisfy the presiding judge that his conduct and manner, though apparently contemptuous, were in fact not so.

The order is annulled, and the bail bond furnished by the relator is discharged and his sureties exonerated.

Order annulled.

EDWARDS, APPELLANT, v. CITY OF HELENA, RESPONDENT.

(No. 4,661.)

(Submitted July 6, 1920. Decided July 9, 1920.)

[191 Pac. 337.]

Cities and Towns—Water Supply—Indebtedness—Constitutional Limit—Validity of Bonds—Injunction—Taxpayer's Suit—Ordinances—When not Repealable.

Cities and Towns—Water Supply—Constitutional Limit—Indebtedness—Validity of Bonds.

1. A city cannot lawfully authorize a bond issue beyond the constitutional three per cent limit for the purpose of improving its water supply, if there is a sufficient margin within that limit to secure the needed funds; but if the council either purposely or through inadvertence declares it necessary to increase the city's indebtedness beyond the limit, when in fact the necessity does not exist, the bonds authorized by a favorable vote of the electors are nevertheless valid city obligations unless the vote was procured or influenced by the deception of the voters to their prejudice.

Same—Bonds and Interest—How Payable.

2. Where a contemplated city bond issue is beyond the three per cent limit and is authorized by section 6, Article XIII, of the Constitution, the revenues of its water plant are irrevocably set aside for the discharge of the principal and interest, and a taxpayer who is not a water user cannot be called upon to contribute unless the revenues of the plant are insufficient, in which event only a property tax may be levied to supply the deficiency.

Same.

3. Where the three per cent margin of a city's indebtedness is sufficient to admit of a contemplated bond issue of the nature of the above, the bonds become the ordinary obligations of the city to be redeemed by funds derived from direct taxes upon property within its limits, unless other provisions are made for the payment of principal and interest.

Same—Water System—Disposition of Revenues.

4. If the revenues from a city owned water plant purchased by funds derived from a sale of bonds issued beyond the three per

cent limit of indebtedness exceed the amount necessary to discharge the indebtedness as it falls due, such excess is subject to disposition by the city council as other public revenues, and may be used to meet a new indebtedness created by an additional bond issue for the improvement of the system.

Same—Injunction—Taxpayer's Suit—When Dismissal Proper.

5. Where the situation of plaintiff taxpayer, in an action to enjoin the issuance and sale of municipal bonds for water supply purposes on the ground that the contemplated increase in the city's indebtedness was unauthorized because it still had a borrowing capacity within the constitutional three per cent limit, rendering the council's action in classifying the bonds as falling without the limit unnecessary, was no different from what it would have been had the council made the correct declaration in the ordinance calling a special election, he was not injured, and judgment of dismissal was proper.

Same—Ordinances—When Irrepealable.

6. An ordinance contractual in its nature, as is one in which it is agreed that if additional indebtedness in the shape of bonds should be authorized at a special election to provide for improving the city's water supply, the revenues derived from the plant would be devoted to the discharge of the indebtedness and resort to direct taxation would be had only in the event they should prove insufficient, and then only to meet the deficit, cannot, in the absence of a provision therein reserving the right of repeal, be repealed without the consent of the other party until the bonds and interest thereon are fully discharged.

[On effect of limitation of municipal indebtedness upon the acquisition of a water supply or sewer system, see note in 59 L. R. A. 604.]

*Appeal from the District Court of Lewis and Clark County;
Wm. H. Poorman, Judge.*

ACTION by Frank J. Edwards to restrain the city of Helena from issuing its water bonds. Complaint dismissed. Plaintiff appeals from the judgment. Affirmed.

Mr. A. P. Heywood, for Appellant, submitted a brief and argued the cause orally.

Mr. E. C. Day submitted a brief in behalf of Respondent and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On February 16 of this year an ordinance was passed by the city council of Helena, and approved by the mayor, directing that a special election be held on April 5 for the purpose

nately. It appeared, further, that the boundaries of special improvement district No. 4 were intended to include the fractional lots in the Potts-Harrison addition, as well as the fractional lots in the original town site. The only controverted question now before this court involves the legality of the council's proceedings in attempting to include the territory in the Potts-Harrison addition. If that addition was a part of the town at the time the district was created, plaintiff cannot complain. He is called upon to pay only his just proportion of [2] the expense. If, however, the addition was not a part of the town in 1913, and was not subject to the jurisdiction of the council for the purpose of creating the improvement district which included a portion of it, then plaintiff is entitled to be heard upon his contention that the tax based upon the area included in the fractional lots in the addition is void *ab initio*.

The record discloses that the plat of the Potts-Harrison addition was filed in the office of the county clerk and recorder of Broadwater county on August 4, 1908, but was not approved by the mayor and council of Townsend until April 30, 1914, several months after district No. 4 was created.

Counsel for defendants insist that, even though the statute [3] was not followed, there was a common-law dedication and acceptance of the streets and alleys within the addition, and *Kaufman v. City of Butte*, 48 Mont. 400, 138 Pac. 770, is cited in support of the contention; but it is one thing to dedicate the streets and alleys to public use as highways and quite another thing to bring the addition within the town's limits and subject the property to the payment of town taxes. "In this state there is no common law in any case where the law is declared by the Code." (Sec. 6213, Rev. Codes.) If, then, the Codes provide the means by which an addition becomes a part of a city or town and subject to its jurisdiction, the means so provided must be held to be exclusive.

Section 3212, Revised Codes, provides: "Whenever territory adjoining any incorporated city or town is surveyed, and laid

off into streets or blocks as an addition thereto, upon filing the map or plat thereof in the office of the county clerk, said territory may become a part of such city or town, upon the approval of the mayor and a majority of the council indorsed thereon."

The meaning of this language is too plain to admit of doubt [4] or controversy. The filing of the plat did not operate to bring the addition within the town. It became a part of the town and subject to the jurisdiction of the council only when the plat was approved by the mayor and council and the approval indorsed thereon. Since this plat was not approved until long after district No. 4 was created, it follows, as of course, that the property of plaintiff within the Potts-Harrison addition was not a part of the town at the time the district was created, and was not subject to the jurisdiction of the council, and cannot be made subject to the payment of the tax sought to be imposed upon it. (*Farlin v. Hill*, 27 Mont. 33, 69 Pac. 239.)

Counsel for defendants insist that the question just determined was not raised by the pleadings; but so far as the record discloses, plaintiff did not know upon what theory defendants refused his tender of the taxes due upon his property within the original town site. Furthermore, it does appear that the question whether the Potts-Harrison addition was within the town was injected into this proceeding by defendants themselves, as is indicated by the question propounded to the witness Louis K. Pool. In any event we think the question was properly before the court, even though plaintiff's complaint might have been made more definite and certain. A great deal of evidence was introduced upon the subject, and plaintiff ought not to be subjected to a burden of taxation imposed by the council upon property not subject to its jurisdiction. [5] The judgment entered in this instance, however, restrains the collection of the entire tax, and in this respect is too comprehensive.

The cause is remanded to the district court, with directions to modify the judgment so as to restrain the collection of the tax in so far as it is computed upon an area in excess of 14,069 square feet, and, when so modified, will stand affirmed. Each party will pay his own costs of this appeal.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and COOPER concur.

MR. JUSTICE MATTHEWS, being disqualified, takes no part in the foregoing decision.

HAYES, RESPONDENT, v. SMITH, COUNTY TREASURER,
APPELLANT.

(No. 4,573.)

(Submitted September 13, 1920. Decided September 27, 1920.)

[192 Pac. 615.]

*Taxation—Livestock—Migratory Stock Law—Unconstitutionality
—Uniformity Rule.*

Taxation—Property in Transit not Taxable.

1. *Obiter*: Property being transported in interstate commerce, while actually in transit through the state is not taxable.

Same—Personal Property—Taxing Power—Situs of Property.

2. The taxing power of the state is limited to subjects which have acquired a situs within it for the purpose of taxation.

Same—Date on Which Property Taxable—Power of Legislature.

3. The legislature has the power to fix a definite date as to which the situs of personal property for taxation is to be determined.

Same—Situs of Property.

4. *Held*, that in order for personal property, other than the net proceeds of mines, to acquire a situs for the purpose of taxation, it must be within the state and subject to its jurisdiction at 12 o'clock noon on the first Monday in March.

Same—Migratory Livestock—Statute—Unconstitutionality.

5. *Held*, that section 2531, Revised Codes, which provides for the taxation of livestock brought into the state for grazing purposes and which by implication confines its operation to stock brought in after March 1 of any one year, without including all other property of the same class so brought in, is unconstitutional as violative of the uniformity rule in matters of taxation.

[As to constitutionality of fencing and stock laws, see note in 6 A. L. R. 1628.]

Same—Discrimination Between Property of Same Class.

6. The state may designate one date to which the assessment of property belonging to one class shall relate, and a different date as to property belonging to a different class, but may not discriminate against particular property belonging to any class.

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

ACTION by Joseph M. Hayes against Mary Smith, as treasurer of Sanders County, Montana. Judgment for plaintiff and defendant appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. S. C. Ford, Attorney General, Mr. Frank Woody, Assistant Attorney General, and Mr. A. A. Alvord, for Appellant.

The first contention of respondent to be considered is that the statute or law providing for such assessment and taxation was and is unconstitutional and that it does not provide for the uniformity of taxation.

Section 2531 of the Revised Codes, the statute in issue, makes no discrimination as to nonresidents, for it contains these words, "any person or persons whomsoever." It applies to citizens of Montana bringing livestock into this state for the purpose of grazing, as well as to nonresidents. (*Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 39 L. R. A. 594, 51 Pac. 593.) The rule laid down in 37 Cyc. 809, 810, is as follows: "Also it is competent for a state to lay taxes on cattle owned by nonresidents and driven into the state for grazing purposes at certain seasons of the year."

A state statute authorizing the levying of a tax upon livestock which are brought into the state for a purpose similar to the purpose for which livestock are maintained therein, as for instance, for grazing, or for the purpose of being fed, is not an unconstitutional statute; and the tax is a valid tax, notwithstanding the fact that the livestock may have been brought into the state for a short period of time, or were through cattle or were ultimately designed for shipment into another state. (*Myers v. Baltimore County Commrs.*, 83 Md. 385, 55 Am. St. Rep. 349, 34 L. R. A. 309, 35 Atl. 144; *Wagoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153; *Prairie Cattle Co. v. Williamson*, 5 Okl. 488, 49 Pac. 937; *Collins v. Green*, 10 Okl. 244, 62 Pac. 813; *Lasater v. Green*, 10 Okl. 335, 62 Pac. 816; *Halff v. Green*, 10 Okl. 338, 62 Pac. 816; *Russell v. Green*, 10 Okl. 340, 62 Pac. 817.)

The United States supreme court in the last two paragraphs of its opinion in the case of *Kelley v. Rhoads*, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259 [see, also, Rose's U. S. Notes], indirectly recognized the constitutionality of a statute very much like ours.

A careful consideration of section 2510, Revised Codes, leads one to believe that the law-making power of the state did not intend that only property in the state on the first Monday of March should be assessed, but that the ownership of the property on that date should determine to whom the property should be assessed. Even if this section and section 2531 provide two different methods of assessment, levy and collection, that would not, according to the cases, affect their constitutionality. A statute cannot be held unconstitutional because it established a different mode of assessment, levy and collection. (*People v. Central Pac. R. Co.*, 43 Cal. 398; *Frontier Land & Cattle Co. v. Baldwin*, 3 Wyo. 764, 31 Pac. 403; *Louisville & N. A. R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358; *City of Dubuque v. Chicago D. & M. R. Co.*, 47 Iowa, 196; *Francis v. Atchison T. & S. F. R. Co.*, 19 Kan. 303; *Missouri River Ft. S. & G. R. Co. v. Morris*, 7 Kan.

210; *Otta County Commrs. v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Langhorne v. Robinson*, 20 Gratt. (Va.) 661; *Wisconsin Cent. R. Co. v. Lincoln Co.*, 57 Wis. 137, 15 N. W. 121; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 425, 38 L. Ed. 1036, 14 Sup. Ct. Rep. 1114 [see, also Rose's U. S. Notes].)

Laws of 1895, page 105, Chapter 61, providing that livestock driven into the state for the purpose of grazing after the first Monday in April in any year shall be assessed for taxes as if it had been in the county at the time of the annual assessment is not unconstitutional, as discriminating between livestock and other property. (*Wright v. Stinson*, 16 Wash. 368, 47 Pac. 761.)

It has been held that a statute regulating the assessment and taxation of logs belonging to nonresidents is not unconstitutional in providing for an assessment in April, while logs belonging to residents are assessed in May. (*Nelson Lumber Co. v. Loraine*, 22 Fed. 54.)

Is the taxation as alleged in respondent's complaint double taxation and void for that reason? We believe not. (37 Cyc. 755 (3) gives this as the rule in such cases: "Each state, however, with regard to the taxation of property within its territorial limits is sovereign and independent; and the taxation of property which is within the jurisdiction of the state is not rendered objectionable as double taxation by the fact that the same property is also assessed for taxation in another state." (*Kelley v. Rhoads*, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259 [see, also, Rose's U. S. Notes]; *Spaulding v. Adams County*, 79 Wash. 193, 140 Pac. 367; *Brown v. Houston*, 33 La. Ann. 843, 39 Am. Rep. 284; s. c., 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; *Coe v. Town of Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 30, 35 L. Ed. 613, 619, 11 Sup. Ct. Rep. 876 [see, also, Rose's U. S. Notes]; *Nelson Lumber Co. v. Loraine*, 22 Fed. 54; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460.)

Mr. A. S. Ainsworth, for Respondent.

Counsel for appellant evidently take the view that our assessment and taxation laws do not provide for any definite time which is to be taken as the date for assessment each year. While it is true that the assessor has until the second Monday of July in which to complete his assessment, yet this has nothing whatsoever to do with the point we make, which is that he must assess such property to the persons by whom it was owned or claimed or in whose possession or control it was at 12 o'clock M. of the first Monday of March next preceding. This of course means that the property must be assessable property, and in order to be such must be in the state on that date. Section 2511, Revised Codes of Montana, 1907, in substance provides for this. Our entire system of taxation bears out our contention that assessment of property is to be based on ownership and location on the first Monday of March.

Everything brought into this state after the first Monday of March is absolutely immune from assessment and taxation for that year, except livestock brought into the state for grazing purposes. This in our opinion, of itself, is not uniformity of taxation.

Sheep may be brought into the state any time after the first Monday of March, and will be exempt from taxation for that year providing they are not grazed. In fact, there is no attempt whatsoever to provide for the taxation of any property brought into the state after the first Monday of March, for that year, except for livestock and then it must be grazed or it will be exempt from taxation. This does not seem to us to be classification; it is rather exempting some property and taxing other, and therefore not uniform. (*Graham v. Commissioners of Chautauqua Co.*, 31 Kan. 473, 2 Pac. 549; *Carbon County Sheep & Cattle Co. v. Board of Commrs.*, 60 Colo. 224, 152 Pac. 903; *Board of County Commrs. v. Wilson*, 15 Colo. 90, 24 Pac. 563; *Leonard v. Reed*, 46 Colo. 307, 133 Am. St. Rep. 77, 104 Pac. 410; *Spaulding v. Patterson*, 46 Colo. 317, 104 Pac. 413; *Norris v. City of Waco*, 57 Tex. 635.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On March 1, 1919, Joseph M. Hayes owned and was in the possession of 3,700 sheep in Morrow county, Oregon, where he resided, and where the sheep were duly assessed for taxation for the year 1919. In June following the sheep were shipped, consigned to the Chicago market. On June 19, the shipment reached Thompson Falls, Montana, and there the sheep were unloaded, and for the ensuing three months were grazed in Sanders county, as was permitted by the bill of lading. On July 8, the assessor of Sanders county listed the sheep for assessment and taxation for 1919, and, the tax levy having been made and the tax extended, this property was charged with the sum of \$518. Hayes applied to the county board of equalization for a cancellation of the assessment, but without avail, and his appeal to the state board was equally unsuccessful. Thereafter this suit was instituted to enjoin the treasurer from collecting the tax, and in the complaint the foregoing facts are set forth somewhat more in detail. The treasurer appeared by general demurrer, which was overruled, and, declining to plead further, suffered judgment to be rendered and entered in favor of the plaintiff, and appealed to this court.

It is the contention of the plaintiff, concurred in by the district court, that the statute under which the revenue officers assumed to act is in contravention of the provisions of sections 1 and 11, Article XII, of the state Constitution, and for that reason null and void. At the earliest opportunity after our Constitution was adopted, an elaborate revenue measure was passed and approved (Laws 1891, p. 73), which provided generally for the assessment and taxation of all property subject to the jurisdiction of the state, and with minor amendments and modifications that Act has been carried forward and is now in full force and effect.

This legislation was the response to the constitutional mandate that the legislative assembly should pass all laws neces-

sary to carry into effect the provisions of Article XII of the Constitution, and particularly the provision in section 11 that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. It is elementary that the taxing power of the state does not extend beyond the territorial limits of the state, and neither does it extend to all subjects actually within the confines of the state, and upon which the state has the physical power to [1] impose a tax, as, for instance, property being transported in interstate commerce, while actually in transit through the state. (*Bacon v. Illinois*, 227 U. S. 504, 57 L. Ed. 615, 33 Sup. Ct. Rep. 299 [see, also, Rose's U. S. Notes].)

Whatever may be said of its vast character and sweeping [2] extent, the power of taxation, of necessity, must be limited to subjects within the jurisdiction of the state, or, as otherwise characterized, to subjects which have acquired a *situs* within the state for the purpose of taxation. In most jurisdictions the annual assessment of property subject to taxation is made as of some definite date, and the *situs* of the property determined as of that date. In pursuance of that general [3, 4] policy, our legislature, by the repeated references in the revenue measure, evinced very clearly an intention that in order for personal property, other than the net proceeds of mines, to acquire a *situs* for the purpose of taxation it must be within the state and subject to its jurisdiction at 12 o'clock noon on the first Monday of March. The references will be found in sections 2510, 2511, 2512, 2552, 2556, 2578, 2579, and 2601, Revised Codes, and possibly elsewhere, but the foregoing are sufficient for present purposes. No provision was made for the assessment of property introduced into the state after the first Monday of March, and in practice such property was not assessed for that fiscal year. Those principles have remained constant to the present time, unless modified by the legislation under which plaintiff's property was assessed. The authority of the legislature thus to fix a definite date as of which the *situs* of personal property for taxation is to be

determined cannot be gainsaid, and since our legislature did so, the question of uniformity of taxation is to be determined with reference to that fact.

On March 14, 1901, the Act in question was passed and approved which provided for the assessment and taxation of [5] livestock brought into this state for the purpose of grazing. (Laws 1901, p. 57.) Section 1 of that Act, now section 2531, Revised Codes, reads as follows: "All livestock brought into this state by any person or persons whomsoever, for the purpose of being grazed for any length of time whatsoever, shall be taxed for the year in which such livestock shall be brought into the state." The other sections of the Act relate to the procedure, and are not directly involved here. Although the Act does not in express terms confine its operation to livestock brought into the state for grazing purposes after the first Monday of March, by necessary implication it does so, and such a construction is commanded, otherwise the entire Act would be meaningless. This is the only change, material to the determination of this appeal, which has been injected into the law since the enactment of the revenue statute in 1891. If this Act be upheld, it follows that since March 14, 1901, livestock brought into this state for grazing after the first Monday of March of any given year, immediately acquires a *situs* for the purpose of taxation for that year, whereas all other personal property brought into the state after that date does not, and is not subject to taxation for that year. In other words, plaintiff's sheep are, by the terms of the Act, rendered subject to taxation in Montana for the year 1919, solely because of the fact that they were brought into the state to be grazed. If they had been introduced for any other purpose they would not have acquired a *situs* for taxation during the fiscal year 1919; or if personal property other than livestock, having the same value as plaintiff's sheep, had been brought into the state after the first Monday of March, 1919, it would not have been subject to taxation for that year. It is because of this discrimination that plaintiff

challenges the validity of section 2531 above, and insists that it provides for taxation, not uniform upon the same class of subjects.

The authority of the state to make a proper classification of property for the purpose of taxation is settled beyond controversy in this jurisdiction. (*Hilger v. Moore*, 56 Mont. 146, 182 Pac. 477.) But a proper classification implies that there exist real differences as between the subjects constituting the different classes, and excludes the idea of arbitrary selection. (*Northwestern Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 62 L. Ed. 1025, 38 Sup. Ct. Rep. 444.)

We are unable to perceive any distinction which can be drawn between a flock of 3,700 head of sheep of a particular breed, size, and description brought into this state after the first Monday of March for the purpose of grazing for any period, and a flock of the same size, breed, description and value brought into the state at the same time for the purpose of being fed in pens for the same length of time, and yet this statute assumes to render the first flock subject to taxation, whereas the other is not. In other words, the attempted classification appears to be entirely arbitrary, and the unjust discrimination apparent.

This subject is not a new one. Migratory stock laws have been enacted in many of the western states, and have received consideration from the highest courts. As early as 1884 a statute very similar in its provisions to the one now under review was before the supreme court of Kansas, and it was held to constitute a distinct departure from the rule of uniformity in the matter of taxation, and therefore unconstitutional and void. (*Graham v. Commissioners of Chautauqua County*, 31 Kan. 473, 2 Pac. 549.) Under like circumstances the same result was reached by the supreme court of Colorado in *Board of County Commissioners v. Wilson*, 15 Colo. 90, 24 Pac. 563.

Attention is directed to the decision in *Wright v. Stinson*, 16 Wash. 368, 47 Pac. 761, and *Kelley v. Rhoads*, 7 Wyo.

237, 75 Am. St. Rep. 904, 39 L. R. A. 594, 51 Pac. 593, wherein a contrary conclusion was reached; but there is not any conflict in the decisions at all. While it is true that the migratory stock law of Washington, and the like character of statute in Wyoming, provided for the assessment and taxation of livestock brought into the state for grazing after the date to which the general assessment of property related, the statute in each state also provided for the assessment and taxation of other personal property brought into the state after that date, so that there was not any discrimination against livestock brought into the state for grazing purposes, as was the case under the Colorado and Kansas statutes, and is the case under our section 2531 above.

Doubtless the state may designate one date as to which the [6] assessment of property belonging to one class shall relate, and a different date as to which the assessment of property belonging to a different class shall relate, but it may not discriminate against particular property belonging to any class; and if this state assumes to provide for the assessment of any property brought within its jurisdiction after the first Monday of March at 12 o'clock noon, it must also provide for the assessment of all other property of the same class so brought in.

There is nothing to be found in the decision of *Nelson Lumber Co. v. Loraine* (C. C.), 22 Fed. 54, which militates against the views here expressed. The Wisconsin statute under review in that case provided for the like assessment and equal taxation of all property belonging to a particular class (logs, timber and ties). The only distinction made was in the time to which the assessment related—the property of nonresidents being assessed during the month of April, and the like character of property of residents assessed as of the 1st day of May. It was held that the local conditions justified the distinction, and that the statute did not discriminate against the nonresident.

Our conclusion is that section 2531 above violates the rule of uniformity declared by our state Constitution, and that the assessment of plaintiff's property in Sanders county for the fiscal year 1919 was without authority of law and void.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

STATE EX REL. CASH, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,674.)

(Submitted September 15, 1920. Decided October 1, 1920.)

*Supervisory Control—When Available—Divorce—Custody of
Minors Pendente Lite—Removal from Jurisdiction.*

Supervisory Control—When Available.

1. Where the remedy by appeal is inadequate, the writ of supervisory control may issue to enable the supreme court to control the course of litigation in inferior courts proceeding by mistake of law or willful disregard of it or where they are doing a gross injustice.

Divorce—Custody of Minor Pendente Lite—Removal from Jurisdiction—Supervisory Control.

2. *Held*, that where defendant wife in a divorce proceeding had been awarded the custody of a minor child pending determination of the action with the restriction that the child be kept within the jurisdiction of the court, which order was subsequently modified so as to permit her to take it to a city outside the state on her promise to return it for trial of the cause, the order was properly annulable under the supervisory control power of the supreme court, since the district court would be in no position to enforce any subsequent order it might make in case defendant did not keep her promise to return to the jurisdiction with the child.

Original application for writ of supervisory control to annul an order of the District Court of Lewis and Clark County in a divorce action. Order annulled.

Mr. Park Smith and Mr. Thos. Hugh Carter, for Relator.

Mr. T. B. Weir, for Respondents.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On application for writ of supervisory control. In June, 1920, there was pending in the district court of Lewis and Clark county an action for divorce, instituted by William A. Cash, and in which issue had been joined, each party, plaintiff and defendant, praying for the custody and control of their three minor children. The court had theretofore awarded the custody, *pendente lite*, of two of the children to the plaintiff and of the four year old daughter, Marjorie Jane Cash, to the defendant, with the restriction that she be kept within the jurisdiction of the court and not taken from Lewis and Clark county without first giving notice to the court or judge thereof of the intention so to do; said order directed the payment by plaintiff to defendant of the sum of \$75 per month for her support and that of said child. On June 29, 1920, defendant applied to the district court and secured an order permitting her to go to the city of Salt Lake, Utah, and to have the said child with her, on her promise to return with said child for the trial of said cause. Defendant being about to depart with the child, plaintiff secured from this court a writ suspending said order in so far as it permits the removal of said child from the state, and commanding the respondent court to appear and show cause why the order should not be annulled. The return thereto admits the facts as set out above, and the only questions presented to us are as to the propriety of the writ and the authority of the lower court to grant a removal of the child beyond its jurisdiction. No briefs have been filed nor have counsel on either side submitted authorities on either question suggested.

In our opinion, the facts present a proper case for the [1] intervention of this court. The order complained of is not an appealable order, and, even if it was, the remedy by appeal would be totally inadequate. One of the functions of

the writ is "to enable this court to control the course of litigation in inferior courts where those courts are proceeding within jurisdiction, but by a mistake of law, or willful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate." (*In re Weston*, 28 Mont. 207, 72 Pac. 512.)

Under the order made by the district court the child, over [2] which the parties were contending therein, would, in the absence of the writ, have been forthwith removed beyond its jurisdiction, with but the questionable promise of the defendant for its return. The court was without power to compel a compliance with such a promise, and its order is tantamount to an abdication of jurisdiction over the child, for, while the court, once having acquired jurisdiction, is not deprived thereof by the removal of the child (19 C. J. 341), it would be in no position to enforce any subsequent order concerning the child while it remained beyond the borders of the state. There is abundant authority to the effect that the court may prohibit such removal; but we find no authority for such an order as was here made, and reason is against such authority.

Having accomplished the removal of the child, it might well be that the mother's love would prove stronger than her unsecured obligation to the court and that her natural caution would dictate that she retain the child beyond the danger zone, or even remove it to some place unknown to the court, until she should learn the nature of the final disposition of the case. If so, of what avail would her written promise be either to the court or to the plaintiff herein?

For the reasons above stated, the writ as prayed for will issue, under the seal of this court, directing the district court and its judge to annul and set aside that portion of its order of June 29, 1920, permitting the removal of Marjorie Jane Cash from the state of Montana pending the final determination of the action.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concurring.

**CARTER, APPELLANT, v. BANKERS' INSURANCE CO.,
RESPONDENT.**

(No. 4,647.)

(Submitted September 13, 1920. Decided October 2, 1920.)

[192 Pac. 827.]

***Attachment — Hail Insurance Policies — Not Contracts for
Direct Payment of Money.***

1. *Held*, that an action to recover damages, unliquidated in character, under hail insurance policies, under one of which a total loss of crops was asserted and under the others of which only partial losses were alleged, was not one upon contracts for the direct payment of money, within the meaning of section 6656, Revised Codes, and that therefore an attachment issued at the commencement of the action was properly dissolved.

[As to risk covered by hail insurance policy, see notes in 7 A. L. R. 373; Ann. Cas. 1917D, 81.]

*Appeal from District Court, Lewis and Clark County;
R. Lee Word, Judge.*

ACTION by George Carter against the Bankers' Insurance Company. From an order dissolving an attachment plaintiff appeals. Affirmed.

Messrs. Walsh, Nolan & Scallon, for Appellant, submitted a brief, and one in reply to that of Respondent; *Mr. William Scallon* argued the cause orally.

The ruling of the court below was based on the decision of this court in the case of *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197. We submit, as our first proposition, that the contracts sued on in this case comply with the requirements of the rule stated in that case.

Although the obligation of the defendant may have been contingent at first, it had become absolute by the happening of the contingency and the making of proofs. There was, of course, a contingency at the time of the issuance of the pol-

icy, as there must be in all contracts for insurance. But, the contingency intended to be provided against had happened. Loss had occurred. The conditions of the policies had been complied with by the insured. The liability of the company had, therefore, become absolute and unconditional. The suit is based, not alone upon the contracts as they were at the time of the issuance of the policy, but upon the contracts and the obligations of the defendant as they existed at the time of the bringing of the suit.

It is not requisite that all of the terms of a contract should be fixed and agreed upon at the time of the making of the contract in order to justify an attachment. If it were otherwise, no attachment could issue upon an implied contract. Merchants' bills for goods sold, without an express agreement as to price would not justify attachment. Yet, the statute expressly says that attachments may issue upon contracts, express or implied. Even implied contracts may be for the "direct payment of money." That also is a necessary consequence of the provision of the statute. The statute, in effect, says so. It would be equivalent to a repeal of the statute to say that implied contracts are not within its purview merely because the amount of money to be paid was not expressly fixed.

It does not seem deniable that a merchant's claim for goods sold and delivered will support an attachment; and if it can, surely these contracts will. The contracts, as sued on, make out a stronger showing of contracts for the direct payment of money than a merchant's claim such as we are now speaking about.

They are more nearly analogous to an account stated, because even the amount of money to be paid had become fixed and definite, and was known to each party before suit brought.

Even at the outset and before the occurrence of the loss, these policies were more explicit and certain than implied contracts such as we are speaking about. The amount to be

paid in case of a total loss is expressly stated. The prices to be allowed for the grain saved in case of a partial loss are specified. The number of bushels threshed is established by the proofs furnished under the policy. It is a mere matter of computation then to determine the amount due. Everything necessary for the determination of the amount is provided for.

"That is certain which can be made certain." (Civ. Code, sec. 6206.) This rule was applied in Colorado in the case of *Stuyvesant v. Western Mortgage & I. Co.*, 22 Colo. 28, 43 Pac. 144, wherein a party upon buying a piece of property had accepted a deed in which it was stated that the purchaser assumed a mortgage on the premises without giving the name of the mortgagee or the amount. The court there held that an attachment could issue against the grantee in such a case, and distinguished it from that of *Hurd v. McClellan*, 14 Colo. 213, 23 Pac. 792, referred to by this court in the *Sparrow Case*.

The complaint, therefore, shows, in each instance, a contractual obligation direct from the defendant to the plaintiff to pay a sum of money definite and certain in amount, and then positively due.

It is held in California, as well as in Montana, that a claim for damages for failure to deliver property agreed to be sold and delivered will not sustain an attachment. In that respect, California and Montana are in accord. (*Willett v. Alpert* (Cal.), 185 Pac. 976; *Beartooth Stock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773.) If it be contended that the sentence occurring in *Sparrow Case*, on page 138, of 29 Mont., to-wit, "The contracts now contemplated by section 890, above, are such only as require the payment unconditionally and absolutely of a definite sum," excludes all contracts in which all these matters are not positively and definitely expressed at the outset, our reply will be that the words quoted cannot be held to mean that; or, if they may, then, as we have said, that the words ought to be qualified. We say that they ought

not to be held to mean that, because, if they did, they would mean that no attachment could issue upon an implied contract, and that, as we have said, would repeal the statute. The words ought to be held to mean that the contract, as sued upon, must be unconditional and absolute, and the liability under it must be for a sum of money definite, or one which can be made definite by reference to the contract, or by proof referable and pursuant to the terms of the contract itself. This would be in accord with the words of the statute. It would also conform to decisions in other states having a similar statute. (*Ross v. Gold Ridge Min. Co.*, 14 Idaho, 687, 95 Pac. 821; *De Leonis v. Etchepare*, 120 Cal. 407, 52 Pac. 718.)

It is not necessary that the contract itself should show the amount due. (*Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *De Leonis v. Etchepare*, *supra*.)

Mr. Henry C. Smith, for Respondent, submitted a brief, and argued the cause orally.

The respondent relies, for affirmance, upon the reasoning of this court in the case of *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197, as supplemented by the case of *Beartooth Stock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773. The learned district judge who made the order in the *Beartooth Stock Company Case* also made the order in this case. He could see no distinguishing feature, in principle, between the two cases. In fact there cannot be any. Counsel for the appellant fail, as it seems to us, to fully comprehend the meaning and purpose of this statute. The contract set forth in the complaint is not in any sense a contract "for the payment of money." This point has been lost sight of by the courts in many of the decided cases. We submit that the contracts contemplated by the various attachment statutes are those only, where the primary purpose of the contract is the payment of money. The basic purpose of this

contract is not the payment of money at all; it is protection to the insured, in certain contingencies. This statute contemplates an attachment on those contracts only, whether they are express or implied, which have for their fundamental purpose a promise to pay money. The decided cases, other than the two to which we have called the court's attention, have very little bearing upon this case. Whatever may have been decided in other states, we have a construction of our own, of this statute, in Montana; and we submit that, after all these years, after the law has become fixed, and settled, since this court has so clearly defined the meaning of the statute, and it has been acquiesced in, and acted upon, for so many years, it ought not to be changed, or restricted, or limited, by this court. If the people of the state are dissatisfied with it, of which there is not any evidence or suggestion, it is for the legislative branch of the government to amend it. That could easily be done by again striking out the word "direct," thus giving the statute in that one respect the meaning which appellant's counsel seem to contend for.

While we see no reason for selecting out "a merchant's claim for goods sold and delivered," as an example, as is done by the appellant, in his brief, still, we accept the challenge, and, among many which might be thought of, instance the case of a balance ascertained and account stated between the parties to such a transaction, wherein the law implies a promise to pay the balance found due. (See *Voight v. Brooks*, 19 Mont. 374; 48 Pac. 549.) On such a contract, which, while implied, is, in law, a direct unconditional promise to pay a liquidated amount of money, an attachment can undoubtedly be had. Such a contract is so conclusive upon the parties that the items of the original account cannot be inquired into, except for fraud, error or mistake. (*Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427; *Stagg & Conrad v. St. Jean*, 29 Mont. 288, 74 Pac. 740; *Johnson v. Gallatin Valley Mill Co.*, 38 Mont. 83, 98 Pac. 883; *McFarland v. Cutter*, 1 Mont. 383.)

It is not necessary that there should be an express promise to pay a balance due, in order to convert an account into an account stated. Such promise may be implied by law from an adjustment of an account by the parties and the ascertainment or admission of a balance due from one of them; and evidence of the assent to the correctness of an account may be found in circumstances from which such assent may be inferred; as where one party presents an account to another, which the latter retains without making objection. (1 Cyc. 375.) So that the merchants, to whom appellant's counsel refers, need have no fear or apprehension growing out of the construction this court has placed upon the statute. This statute is designed to protect not only the creditor but the debtor; an account stated, which is based on contract, express or implied, and overdue, is properly the subject of an attachment. Or, as this court said in the *Sparrow Case*: "The contract [must] require the payment unconditionally and absolutely of a definite sum."

A promissory note is such a contract; and so is a grocery account stated. But we submit that the action of the legislative assembly in 1895, in again placing the word "direct" in the statute clearly evidences an intention to deny the drastic privilege of attachment to a party who simply claims that his neighbor is indebted to him on "contract for the payment of money"; he must have something more than that, to warrant the seizure of the defendant's property (with attending costs and damages) prior to obtaining a judgment.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from an order made by the district court of Lewis and Clark county dissolving an attachment. The complaint contains five causes of action, each of which alleges a breach by defendant of a contract of insurance against damage or destruction of growing crops due to hail, drought, hot winds or any other cause, except fire or flood. One of the

several policies was issued by defendant to plaintiff and a co-owner, the interest of the latter having been assigned to the plaintiff after the loss is alleged to have occurred. The others were issued to four other persons, who also assigned their several interests to the plaintiff. All of the causes of action are substantially the same, except that the first is for a total loss, while the others are for partial losses.

The complaint alleges compliance by the original holders of the policies with all the terms thereof, and that the crops covered by them were either damaged or wholly destroyed by drought and hot winds during the term for which they were issued. It alleges, further, that the defendant's adjuster investigated the losses and accepted the proof of them as sufficient under the requirements of the policies in this behalf. The policies are identical, except as to the amounts claimed and the areas and descriptions of the lands upon which the crops were growing. Each of the policies designates the number of acres in crops covered by it, and fixes the maximum amount which the defendant binds itself to pay for a total loss at \$7 per acre. It contains a provision that in case of a partial loss the quantities of any grain harvested must be valued at the rates therein specified, and the amounts deducted from the maximum amounts fixed for a total loss. This provision is as follows: "That in the event of a partial loss of said crop the amount of damage shall be determined by computing the value of the crop remaining by the following values of each grain, viz.: Wheat, one dollar per bushel; flax, one and 75/100 dollars per bushel; rye, seventy cents per bushel; oats, barley and speltz, fifty cents per bushel; and the damage thereto shall be the difference between the amount for which said crop is insured and the value obtained as herein provided." Aside from this provision, the policies are of the same general form as other insurance policies.

The attachment was issued by the clerk after the commencement of the action, upon plaintiff's filing the affidavit and [1] undertaking required by the statute. The district court

sustained the motion for dissolution of it, on the ground that an insurance policy is not a contract for the "direct payment of money," within the meaning of section 6656 of our Revised Codes. Whether it reached the correct conclusion is the only question presented to this court.

Counsel for the plaintiff contend that the contracts in question come clearly within the statute as interpreted by this court in *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 101 Am. St. Rep. 563, 1 Ann. Cas. 144, 64 L. R. A. 128, 74 Pac. 197, and hence that the order must be reversed. This contention cannot be maintained. As we understand counsel, they proceed upon the idea that, though the obligation assumed by the defendant under the terms of each policy was contingent at the time it was issued, since, at the commencement of the action, the contingency had happened—that is, the loss had occurred—and all the conditions to be performed by the plaintiff had been met, as alleged in the complaint, the obligation assumed by defendant had become absolute and unconditional. In other words, the right of the plaintiff to the writ in any case is to be determined, not by the character of the obligation as expressed in the contract, but by what the plaintiff alleges has occurred thereafter, without reference to the issues presented by the pleadings. In the case stated, this court, speaking through Mr. Justice Holloway, after assigning to the term "direct" the meaning "immediate; express, unambiguous; confessed; absolute"—as it is defined in Webster's Dictionary, pointed out that it must have been inserted in the statute by the legislature to distinguish a particular class of contracts for the payment of money from all other contracts for the payment of money, thus limiting the scope of the statute to the particular class. The court said: "Before 1895 an attachment could be had in every action upon a contract, express or implied, for the payment of money, where the debt was not secured. Since then the writ can only issue in those cases arising on contracts, express or implied, for the direct payment of money, and, applying the definitions of the term

'direct' as given above, the obvious intention of the legislature can be made plain. The contracts now contemplated by section 890 [Rev. Codes, sec. 6656] above, are such only as require the payment unconditionally and absolutely of a definite sum." The contract considered in that case was a bond executed by the defendants as sureties of one White conditioned that they would indemnify the plaintiff against any loss which it might suffer by reason of the failure of White to erect a building for it according to certain plans and specifications. The obligation assumed by the sureties, besides being conditional, was to pay, not an ascertained, liquidated amount, but an amount to be measured by the extent of the loss the plaintiff had suffered, which could be determined only by a trial.

It is true that the contract considered in the *Sparrow Case* was collateral to the main or building contract, which did not call for the payment of money to effect its discharge, but for the erection of the building. Nevertheless the obligation assumed by the sureties was to compensate the plaintiff for the damage suffered by it by reason of the default of White, not to exceed the amount of the penalty mentioned in the bond. The amount of the penalty served only to fix a limit beyond which the sureties could not be held liable, and, though the complaint charged that plaintiff had suffered a loss amounting to a definite sum, the amount for which the sureties could finally be held was to be determined by a judicial solution of the questions: "Did White in fact violate the principal contract?" and "What damage, if any, did plaintiff suffer?" The action was, therefore, not for a sum fixed or ascertainable from the terms of the contract and to be paid in any event, but for an unliquidated sum. So here the amount stated in each of the several policies to cover a total loss merely served to limit the amount for which the defendant could be held liable in any event, leaving the amount to be paid by it to be fixed by the court or jury under the issues presented to the pleadings. Assuming that the defendant puts in issue the allegations of the complaint, whether the loss is alleged to be total or partial, it is incumbent upon the

plaintiff to establish by his evidence that each of his several assignors was the owner of the crops covered by his policy, that they were growing on the lands described in the policy held by him, that a loss had occurred, that the cause of the loss was one or more of the causes named in the policy, that the insured had performed the conditions on his part to be performed, and that he had assigned his interest to the plaintiff. Thus it appears that the policies fall into the class of those contracts which are excluded by the statute as interpreted in the *Sparrow Case*. The causes of action predicated upon them are for unliquidated damages, to be ascertained by the court or jury, and therefore they do not arise upon contracts for the direct payment of money. In this respect the policies are not distinguishable from the bond considered in the *Sparrow Case*.

Counsel argue that, if the conclusion announced in the *Sparrow Case* excludes these contracts from the class designated in the statute, it should be modified, or the result is that implied contracts such as merchants' accounts, expressly included by the statute, are to be deemed excluded. It may be that the rule as therein stated is open to the criticism of it made by counsel. It is a sufficient answer to this contention, however, to say that, if the rule is to be modified, this may be properly done in a case when the necessity arises. It does not arise in this case. However it may hereafter be modified, it seems clear that the legislature, in enacting the statute, did not intend to authorize an attachment in actions such as this, to recover unliquidated damages arising out of breaches of contract. This was expressly held in the case of *Beartooth Stock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773, and we see no reason to recede from the conclusion there stated.

The order is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

SELL, APPELLANT, v. SELL, RESPONDENT.

(No. 4,519.)

(Submitted September 15, 1920. Decided October 4, 1920.)

[193 Pac. 561.]

Divorce—Pleading and Practice—Unwarranted Judgment—Answer—New Matter—General Denial—Evidence—Admissibility—Common Law—New Trial—Affidavits—Failure to File in Time—Proper Denial of Motion—What is not “Default.”

Default Judgment—What Does not Constitute.

1. Where, after issues were joined in a divorce proceeding, the plaintiff failed to appear at the time set for trial, her counsel, however, being present and participating in it, an order directing that her default be entered amounted to no more than a declaration that she had failed to be personally present, and did not constitute a “default” within the meaning of section 6719, necessitating a motion to set it aside, and, such a motion having been made, an order denying it could not adversely affect any substantial right of plaintiff and therefore was not an appealable error.

Divorce—Dismissal or Nonsuit—When Proper—Affirmative Relief to Defendant—When Unwarranted.

2. The failure of the plaintiff in a suit for divorce to be present at the trial or offer any evidence in support of the allegations of her complaint which were put in issue by the answer constituted an abandonment of her cause and authorized the court to render a judgment of dismissal or nonsuit, but, in the absence of a counterclaim, or new matter in the answer constituting a defense warranting it, it could not grant affirmative relief to defendant.

[As to voluntary dismissal of bill for divorce, see note in *Ann. Cas.* 1917A, 1197.]

Pleading—Answer—New Matter.

3. If the facts stated in the answer can be proved under a denial of the allegations of the complaint, they do not constitute new matter.

Same—General Denial—Evidence Admissible.

4. Under a general denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts, establishment of which is indispensable to his cause of action.

Divorce—Complaint—Necessary Allegation.

5. An allegation in plaintiff's complaint in an action for divorce that at the time of its commencement the parties were husband and wife was indispensable to a statement of a cause of action.

Same—Judgment of Nonmarriage—When Improper.

6. *Held*, that since it was necessary for plaintiff in her action for divorce to allege and prove the existence of the marriage, evidence that the parties were never married was admissible under defendant's denial of such allegation, and that therefore his subsequent affirmative allegation of nonmarriage did not constitute new matter upon which he could be granted affirmative relief to the effect that the parties never sustained the relation of husband and wife.

Same—Common-law Action for Jactitation of Marriage Does not Lie.

7. Power to decree a divorce is statutory, and since ample provision is made by the Codes for the protection of the marital relation, including an action to establish marriage when either party denies its existence, an action under common-law procedure for jactitation of marriage under which a party wrongfully claiming that a marriage exists may be enjoined from so proclaiming to others, does not obtain in Montana.

ON MOTION FOR REHEARING.**New Trial—Order of Denial to be Sustained if Possible.**

8. Where an order denying a motion for new trial is general in terms, it must be sustained, if it can be upon any legitimate ground.

Same—Statutory Provisions to be Complied With.

9. A party moving for a new trial may, under section 6795, Revised Codes, in the same motion, present some of the causes designated in section 6794, and relied upon, by affidavit, others by bill of exception and still others upon the minutes of the court, but irrespective of the mode selected, the movant must pursue the statute in all substantial particulars.

Same—Failure to File Affidavits in Time—Proper Denial of Motion.

10. *Held*, that since the purpose sought to be subserved by Chapter 41, Laws of 1907, amending prior statutes relating to new trial proceedings, was to avoid delays, by providing the means for a hearing upon the motion immediately after notice of intention is given, the movant may not designate the minutes of the court and affidavits thereafter to be prepared as the moving papers, then secure an extension of time in which to prepare them, afterward abandon the affidavits by failing to prepare them within the time allowed, and then insist that the motion should be heard on the minutes of the court.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

ACTION for divorce by Hattie Sell against Herman Sell. From orders refusing to set aside plaintiff's default and denying her motion for new trial, and from a judgment rendered for defendant, plaintiff appeals. Orders affirmed and cause remanded, with directions to set aside the judgment and enter one of dismissal or nonsuit in lieu thereof.

Mr. A. H. McConnell and *Mr. Chas. E. Pew*, for Appellant, submitted a brief, and one in reply to that of Respondent; *Mr. Pew* argued the cause orally.

Messrs. Belden & De Kalb, for Respondent; *Mr. H. L. De Kalb* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action for divorce was instituted by Hattie Sell in January, 1913. Issues were joined and the cause was tried during the same year, resulting in a decree in favor of the plaintiff; but thereafter, by stipulation of the parties, the decree was set aside and a new trial granted. On November 14, 1918, the cause was set for trial for November 29, at 10 o'clock A. M., but, when that hour arrived, the plaintiff was not personally present in court, and a continuance was granted until 2 o'clock P. M., at which time, the plaintiff having failed to appear personally, the court ordered her default entered, heard the testimony offered by the defendant, and thereafter rendered judgment to the effect that plaintiff and defendant had not at any time "sustained the relation one to the other of husband and wife." Plaintiff has appealed from an order refusing to set aside the default, from an order denying her a new trial, and from the judgment.

(1) Whatever may be said of the propriety of the court's order [1] entered on November 29, 1918, it did not affect adversely any substantial right of the plaintiff. Her attorney was present and participated in the trial by examining the defendant's witnesses, and otherwise. In legal effect, the order amounted to nothing more than a declaration that the plaintiff had failed to be personally present at the time of trial, and in that sense the term "default" is not infrequently used. (*Leahy v. Wayne Circuit Judge*, 144 Mich. 304, 115 Am. St. Rep. 443, 107 N. W. 1060.) It is elementary that a judgment by default cannot be entered against a party so long as he has

an appropriate pleading on file in the case (sec. 6719, Rev. Codes), and the judgment rendered in this cause does not purport to be, and is not in fact, a judgment by default. It was unnecessary for plaintiff to move to have the default set aside. No useful purpose would have been served if the motion had been granted, and its denial does not constitute error.

(2) The trial court did not err in refusing plaintiff's motion for a new trial. The bill of exceptions was not prepared within the time allowed by law or the order of the court. (*Wright v. Matthews*, 28 Mont. 442, 72 Pac. 820; *Canning v. Fried*, 48 Mont. 560, 139 Pac. 448.)

(3) The appeal from the judgment presents the question: [2] Was the trial court authorized to render and have entered a judgment which assumes to determine that plaintiff and defendant were never married? The material allegations of the complaint were put in issue by the answer, and the burden was thereby imposed upon the plaintiff to produce evidence in support of her cause of action. Her failure to be present at the trial or to offer any evidence in behalf of the allegations in her complaint which were traversed by the answer constituted, in effect, an abandonment of her cause and authorized the court to render a judgment of dismissal or nonsuit (sec. 6714, Rev. Codes); but the court was not authorized to proceed further unless the answer contained a counterclaim or new matter constituting a defense which would warrant affirmative relief in defendant's behalf. (*Keator v. Glaspie*, 44 Minn. 448, 47 N. W. 52; *Diment v. Bloom*, 67 Minn. 111, 69 N. W. 700; 2 Thompson on Trials, 2d ed., sec. 2229.)

The answer does not assume to state a counterclaim. [3-6] Defendant does not set forth any cause for divorce or pray for a dissolution of the marriage; on the contrary, he denies the existence of the marriage. The only portion of the answer which it is contended sets forth new matter within the contemplation of our statute is found in paragraph 1 of defendant's further and separate answer, and is

as follows: "That this answering defendant is not now, and never was, married to the plaintiff in this said action." In *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189, this court was called upon to determine the meaning of the term "new matter" as used in our Practice Act, and held that, if the facts stated in the answer can be proved under a denial of the allegations of the complaint, they do not constitute new matter. Of the correctness of that conclusion we entertain no doubt whatever. The allegation in the complaint that at the time this action was commenced, plaintiff and defendant were husband and wife, was indispensable to the statement of a cause of action for divorce. (9 R. C. L. 417.) That allegation was denied in the first paragraph of the answer, and the denial imposed upon the plaintiff the burden of proving the fact by a preponderance of the evidence. (9 R. C. L. 433; 19 Corpus Juris, 124; section 8028, Rev. Codes.) In the *Conley Case*, above, we held further that "Under a general denial of the allegations of the complaint the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish to sustain his action." It follows that, since it was necessary for plaintiff to allege and prove the existence of the marriage, evidence that the parties were never married was admissible under the denial in the answer, and that the affirmative allegation of nonmarriage does not constitute new matter upon which defendant can be granted affirmative relief.

It is urged by counsel for respondent that the allegation [7] of nonmarriage as a ground for affirmative relief is warranted by the course of procedure at common law and is in the nature of a cross-bill setting forth the grounds of complaint in an action for jactitation of marriage. Anciently, at common law, where one person, not being married to another, pretended that a marriage existed between them and proclaimed it to others, the person against whom the claim was made, upon due proof, was entitled to a decree enjoining the offender from the false boasting. Cases of that char-

acter arose occasionally in England, but they were peculiarly within the cognizance of the ecclesiastical courts. (Blackstone, 93). The action, however, fell into disrepute in 1776, when the House of Lords in the *Duchess of Kingstone's Case* (20 How. St. Tr. 543) decided that the final decree was not conclusive of the fact of nonmarriage. In this jurisdiction the power to decree a divorce is purely statutory. (*Rumping v. Rumping*, 36 Mont. 39, 12 Ann. Cas. 1090, 12 L. R. A. (n. s.) 1197, 91 Pac. 1057.) Ample provision is apparently made by our Codes for the protection of the marital relation, and the significant fact that an action is authorized to establish marriage whenever either party to it denies the existence of the relationship (sec. 3634, Rev. Codes), tends to negative the existence of the right which is now sought to be asserted. We think it can be said in all fairness that the right of action for jactitation of marriage has never been recognized as warranted by the common law as it was introduced in and adopted by this country. (19 Am. & Eng. Ency. of Law, 1217.)

The order overruling plaintiff's motion to set aside the default is affirmed, as is the order denying a new trial. The cause is remanded to the district court, with directions to set aside the decree entered herein and in lieu thereof to render and have entered a judgment for dismissal or nonsuit and for defendant's costs. Each party will pay his costs of these appeals.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and COOPER concur.

MR. JUSTICE MATTHEWS, deeming himself disqualified, takes no part in the foregoing decision.

ON MOTION FOR REHEARING.

(Decided November 29, 1920.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In the original opinion heretofore promulgated, this court by inadvertence made the statement: "The bill of exceptions was not prepared within the time allowed by law or the order of the court." There was not any bill of exceptions whatever before the court at the time the motion for a new trial was submitted. The statement should have been: "The affidavit in support of the motion for a new trial was not prepared within the time allowed by law or the order of the court."

The record discloses that the notice of intention designated, as the moving papers, the minutes of the court and affidavits thereafter to be prepared; that upon application the court granted an extension of time for the preparation, service and filing of the affidavits; that the period as thus extended, expired on February 2; that it was not until April 28 that plaintiff's affidavit—the only one offered in support of the motion—was served or filed; that the motion for a new trial was not submitted to the court until May 29; and that timely objection was made to the consideration of the affidavit.

The order denying the motion is general in terms and must [8] be sustained, if it can be upon any legitimate ground. The fair inference from the record is that the trial court disregarded the affidavit because it was not filed in time. Upon this motion for rehearing, counsel insist that, even though the affidavit was not properly before the lower court, the minutes of the court were, and upon them alone a new trial should have been granted. This contention requires brief consideration of the statutes governing new trial proceedings.

Section 6794, Revised Codes, designates the several causes [9] for all or any of which a new trial may be granted.

From 1895 to 1907, a motion for a new trial could be heard only upon affidavits, or a bill of exceptions or statement duly settled and allowed before the motion was submitted (sec. 1172, Code Civ. Proc. 1895). By an Act approved February 26, 1907 (Laws 1907, p. 89), the scope of existing statutes was enlarged and the minutes of the court were designated as among the records and papers upon which a motion for a new trial might be made. Since the date of the amending Act, the statute—now section 6795, Revised Codes—has provided that certain of the causes mentioned in section 6794 must be presented by affidavit, others by affidavit or bill of exceptions, or both, and still others by bill of exceptions or the minutes of the court. Under the construction heretofore placed upon section 6795, the moving party may, in the same motion, present some of the causes by affidavit, others by bill of exceptions, and others upon the minutes of the court (*Moore v. Butte Elec. Ry. Co.*, 47 Mont. 214, 131 Pac. 635); but, irrespective of the mode selected, the moving party must pursue the statute in all substantial particulars. (*State ex rel. Stromberg-Mullins Co. v. District Court*, 28 Mont. 123, 72 Pac. 412.)

In enacting the amendatory statute of February 26, 1907, [10] the legislature had a distinct purpose in view, *viz.*, to avoid the delays incident to new trial proceedings under prior statutes, by providing the means for a hearing upon the motion *immediately* after the notice of intention is given and when the proceedings, including the evidence, are fresh in the minds of court and counsel. (*State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139.) This legislative purpose is emphasized in one of the amendments referred to and now incorporated in section 6797 as follows: "The application for a new trial must be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court."

It would defeat the very purpose of the statute to permit the moving party to designate the minutes of the court and

affidavits as the moving papers, secure an extension of time for preparation of the affidavits, afterward abandon them by failing to prepare them within the time allowed, and still insist that the motion should be heard upon the minutes of the court.

As observed before, the order denying the motion does not indicate the reason for the court's ruling. The evidence should have been disregarded for failure of the moving party to submit the motion within the time contemplated by section 6797. But if these objections be waived, the result would not be different. From a review of the evidence we are unable to find that the court abused its discretion in denying the motion for a new trial.

The inadvertence of this court indicated above does not require a rehearing of the cause, and the motion for a rehearing is accordingly denied.

Rehearing denied.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and COOPER concur.

MR. JUSTICE MATTHEWS deeming himself disqualified, took no part in the original decision, and therefore takes no part in this.

STATE EX REL. FIRST NATIONAL BANK OF MOLT,
APPELLANT, v. HEATH ET AL., RESPONDENTS.

(No. 4,671.)

(Submitted September 27, 1920. Decided October 4, 1920.)

[192 Pac. 1108.]

Prohibition—Drains—Board of Review—Appeal—Jurisdiction.

Drains—Board of Review—Jurisdiction on Appeal—Prohibition.

1. A drainage district was duly organized under the provisions of Chapter 147 of the Laws of 1915. No effort was made by *certiorari* or otherwise to review the action of the drain commissioner in establishing the district. Contracts were let and

warrants issued to a large amount. As organized, the district embraced 231,563 acres. One party interested (a county) appealed from the final order of the commissioner. A board of review was appointed, which thereupon reviewed all of the acts and decisions of the commissioner and made its final report excluding from the district about 225,000 acres, leaving approximately 6,000 acres in it. *Held*, on appeal from a judgment quashing an alternative writ of prohibition, that the board was without authority to hear and determine the legality of all of the acts and decisions of the commissioner not appealed from and to make the exclusion it did, but was limited in its review to the one matter properly before it—the appeal of the county.

[As to drainage districts, see note in *Ann. Cas.* 1915C, 9.]

Same—"Review" on Appeal—Definition.

2. The term "review" as used in the Drainage Act (Chap. 147, Laws of 1915) giving the reviewing board power to review all assessments and correct errors therein, *etc.*, means review on appeal taken as provided by the Act, by a party deeming himself aggrieved.

Appeal from District Court, Stillwater County; A. P. Stark, Judge.

Original application for writ of prohibition by the State, on the relation of the First National Bank of Molt, against Warren Heath and others, as the Board of Review for Big Lake Drainage District No. 1, Stillwater County, and H. M. Ray, as Drain Commissioner of said County. From a judgment quashing an alternative writ, relator appeals. Reversed.

Messrs. Collins, Campbell & Wood, for Appellant, submitted a brief; *Mr. Sterling M. Wood* argued the cause orally.

Chapter 147, Laws of 1915, is practically identical with the drainage law of Michigan, as contained in Howell's Annotated Statutes, second edition, sections 3376 *et seq.* In *Whiteford v. Probate Judge*, 53 Mich. 130, 18 N. W. 593, the court in a drainage matter holds: "The proceedings are all statutory, not according to the course of the common law, and must strictly conform to the statutes authorizing them. Every material requirement of the statute must be observed, and the proceedings must show on their face a substantial compliance with the law." In *Gillett v. McLaughlin*, 69 Mich. 547, 37 N. W. 551, the court strictly construes the appeal right given

to aggrieved persons under the drainage law, and holds, in effect, that the appellate body cannot act outside of the express power given to it in the statute.

We may, therefore, with propriety conclude that the powers of the board of review must be strictly construed, that it can take nothing by intendment, nor act at all except where specifically authorized in the premises; and this being the case, we find, under the record herein, no authority whatever in the board of review, upon the appeal of Stillwater county involving only the assessment of its highways, to exclude any other property whatsoever from the district or to cancel any other assessments. The power to so act is not to be found in the language of the statute, for the exclusion of other land, and the cancellation of other assessments has not been made the subject "matter of appeal." No appeal with respect to such matter having been taken, other property owners are concluded by the adjudication of the drain commissioner, and the board is without right, power, authority or jurisdiction to set the adjudication aside, as it threatens to do.

It should be borne in mind that in connection with the powers of the board of review under the Drainage Act, the statute in every instance limits the powers of the board to a "review" alone. The word "review" as used in connection with appellate procedure generally is defined to mean review on appeal "for that is the only method whereby a review may be had." (7 Words & Phrases, 6214, 6215.) In other words, before an appellate board or court can review any matter whatsoever there must be an appeal involving that matter. (*First Nat. Bank of Helena v. McAndrews*, 5 Mont. 251, 5 Pac. 279; *City of Indianapolis v. Hawkins*, 180 Ind. 382, 103 N. E. 10.) The statute does not authorize the board, either in express language or by any implication, to retry any matter, and certainly not to retry all adjudicated matters in the drainage district. It has reviewing powers only.

Apart from the above, it is a settled rule of appellate procedure generally that the rights of persons who are not parties

to an appeal cannot be considered upon the appeal. (3 Cyc. 411; 4 Corpus Juris, 1102 *et seq.*)

No appeal having been taken to the board involving the question of the general exclusion of territory proposed now by the board and the annulment of assessments, it did not acquire jurisdiction to pass upon these matters. (*Washoe Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866; *Featherman v. Granite County*, 28 Mont. 462, 72 Pac. 972; *Baacke v. Dredla*, 57 Neb. 92, 77 N. W. 341; *Horner v. Biggam*, 36 Mich. 243.)

In *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841, the court, with citation of authorities, determines that in the class of cases here under consideration the action of an official, like the drain commissioner, is not open to collateral attack, but becomes a final adjudication if not corrected by some of the modes pointed out by statute. (*Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22; *Troost v. Fellows*, 169 Mich. 66, 134 N. W. 1011; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.)

If it is contended by the respondents that the board of review has the power to cancel assessments, and to omit territory, in connection with the correction of error or inequality in the assessment against Stillwater county, under the first portion of section 4, Article IV, of the drainage district law, that contention cannot be sustained under decision of the Michigan court upon an identical statute. We refer to the case of *Thomas v. Walker Township Board*, 116 Mich. 597, 74 N. W. 1048.

Prohibition is the proper remedy. (32 Cyc. 605, 607; *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225, 227; *People v. District Court*, 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604.) If it is suggested that an appeal lies from the action of the board, so that prohibition is not a proper remedy, there being in such event an adequate remedy at law, we concede that section 4, Article IV, of the Act provides: "The action and decision of said board [meaning the board of review] shall be

final except in case of an appeal therefrom." Nothing further with respect to an appeal from the action of the board will be found in the statute, and we can conjecture only in whom any alleged appeal right is vested, within what time it shall be exercised, how and when it shall be taken, and what tribunal, court, body or person will entertain the appeal if an attempt is made to take one. It is manifest that if the legislature intended to give the right of appeal, it did not carry out its intention in the premises, for the statute is utterly inadequate and incomplete on the subject, and does not in terms confer any appeal right whatsoever. But this court has announced the rule which here applies. In *In re Searles*, 46 Mont. 322, 127 Pac. 902, it is said: "If the appeal is not specifically provided for, review by it cannot be had." (3 Corpus Juris, par. 133; *State ex rel. Cohn v. District Court*, 38 Mont. 119, 99 Pac. 139.) Under the rule of the last-cited case, we contend that this court has no power to supply deficiencies in Chapter 147, and point out when, to whom, or in what manner, an appeal from the action of the board shall be taken, for this is within the province of the legislature alone, and the legislature has not acted.

Messrs. Gunn, Rasch & Hall and *Mr. M. L. Parcells*, for Respondents, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

It is first argued for appellant that as the only appeal taken was by Stillwater county alone, the board of review is without jurisdiction to omit or exclude any lands in which Stillwater county is not interested, and is confined to a review of the assessment against said county.

According to section 2, Article IV, of the Drainage Act, the appeal is taken by making an application to the district court of the proper county for the appointment of a board of review, and "by serving upon the drain commissioner, and filing with said district court, a notice to that effect, and by filing also a bond with such court," etc. As the law expressly

an appropriate pleading on file in the case (sec. 6719, Rev. Codes), and the judgment rendered in this cause does not purport to be, and is not in fact, a judgment by default. It was unnecessary for plaintiff to move to have the default set aside. No useful purpose would have been served if the motion had been granted, and its denial does not constitute error.

(2) The trial court did not err in refusing plaintiff's motion for a new trial. The bill of exceptions was not prepared within the time allowed by law or the order of the court. (*Wright v. Matthews*, 28 Mont. 442, 72 Pac. 820; *Canning v. Fried*, 48 Mont. 560, 139 Pac. 448.)

(3) The appeal from the judgment presents the question: [2] Was the trial court authorized to render and have entered a judgment which assumes to determine that plaintiff and defendant were never married? The material allegations of the complaint were put in issue by the answer, and the burden was thereby imposed upon the plaintiff to produce evidence in support of her cause of action. Her failure to be present at the trial or to offer any evidence in behalf of the allegations in her complaint which were traversed by the answer constituted, in effect, an abandonment of her cause and authorized the court to render a judgment of dismissal or nonsuit (sec. 6714, Rev. Codes); but the court was not authorized to proceed further unless the answer contained a counterclaim or new matter constituting a defense which would warrant affirmative relief in defendant's behalf. (*Keator v. Glaspie*, 44 Minn. 448, 47 N. W. 52; *Diment v. Bloom*, 67 Minn. 111, 69 N. W. 700; 2 Thompson on Trials, 2d ed., sec. 2229.)

The answer does not assume to state a counterclaim. [3-6] Defendant does not set forth any cause for divorce or pray for a dissolution of the marriage; on the contrary, he denies the existence of the marriage. The only portion of the answer which it is contended sets forth new matter within the contemplation of our statute is found in paragraph 1 of defendant's further and separate answer, and is

as follows: "That this answering defendant is not now, and never was, married to the plaintiff in this said action." In *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189, this court was called upon to determine the meaning of the term "new matter" as used in our Practice Act, and held that, if the facts stated in the answer can be proved under a denial of the allegations of the complaint, they do not constitute new matter. Of the correctness of that conclusion we entertain no doubt whatever. The allegation in the complaint that at the time this action was commenced, plaintiff and defendant were husband and wife, was indispensable to the statement of a cause of action for divorce. (9 R. C. L. 417.) That allegation was denied in the first paragraph of the answer, and the denial imposed upon the plaintiff the burden of proving the fact by a preponderance of the evidence. (9 R. C. L. 433; 19 Corpus Juris, 124; section 8028, Rev. Codes.) In the *Conley Case*, above, we held further that "Under a general denial of the allegations of the complaint the defendant may introduce any evidence which goes to controvert the facts which the plaintiff is bound to establish to sustain his action." It follows that, since it was necessary for plaintiff to allege and prove the existence of the marriage, evidence that the parties were never married was admissible under the denial in the answer, and that the affirmative allegation of nonmarriage does not constitute new matter upon which defendant can be granted affirmative relief.

It is urged by counsel for respondent that the allegation [7] of nonmarriage as a ground for affirmative relief is warranted by the course of procedure at common law and is in the nature of a cross-bill setting forth the grounds of complaint in an action for jactitation of marriage. Anciently, at common law, where one person, not being married to another, pretended that a marriage existed between them and proclaimed it to others, the person against whom the claim was made, upon due proof, was entitled to a decree enjoining the offender from the false boasting. Cases of that char-

the drain commissioner, and may add lands excluded by the drain commissioner when, in the judgment of the board, according to the provisions of section 1 of Article IV, the lands omitted should not have been included and assessed, and the lands added should have been included and assessed.

In view of the power to omit or exclude lands conferred upon the board in such plain and unambiguous language, it is idle to contend that such power does not exist.

In the brief for appellant, the case of *Thomas v. Walker Township Board*, 116 Mich. 597, 74 N. W. 1048, is cited. The Michigan statute does not authorize the board of review to omit or exclude any land or property from the district as created by the drain commissioner. The section of the Michigan statute defining the powers of the board is quoted in the opinion as follows: "Section 5 provides that the board shall proceed to view the grounds, to review the assessments made by the commissioner, to hear the proofs and allegations of all parties in respect to the matter of such appeals, and if in their judgment there be manifest error or inequality in such assessment, they may order such changes to be made as they may deem just and equitable."

After the decision in the case of *Thomas v. Walker Township Board*, and in 1899, the Michigan statute was amended by conferring upon the board authority to add lands to the district. The amendment, however, does not confer power to exclude any lands from the district. (See section 3405 of Howell's Michigan Statutes (second edition).)

It is further argued that where the drain commissioner has included in the district and made assessments against land only within the classes of land described in said section 1 of Article IV, his action cannot be reviewed, and the board is without authority to eliminate any lands from the district. It is argued that if lands are within the "watershed of the drain," and have been included by the drain commissioner in the district, his action is final and conclusive. This argument overlooks entirely the fundamental principle of law

that there cannot be an assessment without some benefit, and this is recognized by the very language of the section by which the benefits accruing to any land or property are to be considered in making the assessments. To construe the statute as requiring the assessment to be made for the cost of construction of a drain without reference to the benefits accruing to the lands assessed, would render the statute unconstitutional as operating to take property without due process of law.

The legislative assembly has not assumed to fix the boundaries of a drainage district or to designate the lands to be assessed, but has merely declared that in apportioning the cost and in making the assessments, certain principles stated in section 1 of Article IV shall be regarded. The apportionment of the cost and the making of the assessment must be confined to the lands described in said section 1, but what lands so described will be benefited, and should be assessed, is left in the first instance to the judgment and discretion of the drain commissioner, and upon an appeal being taken to the judgment and discretion of the board of review. The drain commissioner occupies a position similar to that of a county assessor, and the board of review is somewhat analogous to a county board of equalization. (See *Zinser v. Board of Supervisors*, 137 Iowa, 660, 114 N. W. 51.)

In view of section 7227, Revised Codes, declaring when prohibition may issue, the only question for determination is whether the board of review has jurisdiction to omit lands and annul the assessments thereon. Whether the lands which the board proposes to eliminate from the district should be eliminated is a matter confided by the law to the judgment and discretion of the board. As the proposed action of the board is within its jurisdiction, and in the exercise of power expressly conferred by the statute, no inquiry can be made in this proceeding with reference to the proper exercise of its judgment and discretion. (*State ex rel. Boston & M. etc. Co. v. Second Judicial District Court*, 22 Mont. 220, 56 Pac.

219; *State ex rel. Heinze v. District Court*, 32 Mont. 394, 80 Pac. 673.)

MR. JUSTICE MATTHEWS delivered the opinion of the court. .

Appeal from a judgment quashing alternative writ of prohibition. On April 7, 1920, the relator filed in the district court of the county of Stillwater its duly verified petition for a writ of prohibition. The return to the alternative writ joins issue solely on questions of law, and under it all matters properly pleaded in the petition are admitted.

From the petition it appears that the "Big Lake drainage district No. 1" was duly organized under the provisions of Chapter 147, Laws of 1915, that the statute was complied with in the subsequent steps taken, and that, after the drain commissioner made his final order determining the boundaries of the district and describing the lands and other property embraced therein, he filed said order with the county clerk, and gave the notices required by the provisions of said chapter. No effort was made by *certiorari*, within the time provided in the statute, or at all, to review the action of the commissioner in establishing the district, nor was any effort made by any land owner to delay or prevent the making of contracts for the construction of the drain. The contracts were let, and warrants issued aggregating approximately \$31,000, of which the relator here holds approximately \$11,000 worth. The district, as organized, embraced 231,563 acres of land, and, as alleged in the petition, relator became the owner of the warrants under the belief that such land would be assessed for the construction of the work for which the warrants had been issued, and without knowledge of any threatened action to exclude from said district any part of said land.

In determining the property to be benefited by the drain, and consequently subject to assessment for the work, the drain commissioner in his final report and order declared: " * * * The county of Stillwater, Montana, for benefits or improve-

ments by reason of drainage of approximately twelve miles of established county roads, located within said district, which said county is benefited thereby in the sum of approximately \$1,000 by reason of said improvement."

Proceeding under section 2 of Article IV of the Act, the county of Stillwater thereupon, and within the time provided by said section, appealed from the final order of the commissioner, and, in conformity with the provisions of the Act, made application to the district court for the appointment of a board of review, and perfected its appeal by the filing of the bond required by the section. It is conceded that the county of Stillwater was the only party affected who appealed in the manner provided by the statute, or at all. Upon the perfecting of its appeal and the making of its application, the district court appointed the respondent board in the manner prescribed. The board thus legally constituted proceeded to canvass and review apparently all of the acts and decisions of the drain commissioner. As to certain lands, protests and claims of exemption from taxation were filed with the board of review, although the time for appeal had long since expired, and apparently, as to other tracts, the board proceeded to review the action of the commissioner without complaint or protest filed. Having concluded their hearings, the board announced its purpose to file its final report striking from and excluding from the district approximately 225,000 acres of the land included in the district. In the application for the alternative writ in the lower court it is alleged that the board of review threatens to, and will unless restrained by the court, file said report and exclude from the district said 225,000 acres, leaving approximately 6,000 acres of land in the district. This is admitted by the return to the writ and in argument.

The only question thus presented is that of the authority [1] or jurisdiction of the board of review thus created, on the application of a single appellant, to hear and determine the legality of all assessments made and the inclusion of all

lands in the district by the final order of the drain commissioner.

Counsel for the respondent board contend that, under the peculiar wording of the provisions concerning appeal, and particularly the closing paragraph of section 2, Article IV, of the Act, to-wit, "Only one application for a board of review shall be entertained by such district court for any one drain," there can be but one appeal, and that such an appeal brings before the board the question of the legality and propriety of every act and all orders of the drain commissioner.

Chapter 147 of the Laws of 1915 provides for the establishment of drain districts and the construction of drains for the improvement of agricultural lands and the protection of the public health, convenience or welfare.

Article I thereof provides for the appointment of a county drain commissioner by any county of the state desiring to take advantage of the provisions of the Act, and defines the powers and duties of such commissioner.

Article II provides for the establishment of a drain district on application, in writing, describing the boundaries, *etc.*, of the drain and signed by not less than ten freeholders, at least five of whom must be owners of land liable to assessment for benefits in the construction of such drain; said petitioners being jointly and severally liable for the preliminary cost and expenses of determination and survey of the proposed drain. The article then provides for the establishment of the district, the survey of the drain, acquisition of right of way, *etc.*, and the order of establishment by the drain commissioner.

Article III provides that upon the release of the right of way the commissioner shall make his final order of determination and shall therein describe the boundaries and the lands embraced in the district, and shall file the same with the county clerk, prepare specifications for the work to be done, and give ten days' notice of the time and place of letting contracts for the work, which notice shall, among other things, describe the several tracts of land included and the manner

in which the funds for the construction of the drain shall be raised, giving the number of annual assessments, and that "The apportionment of the assessment * * * will be subject to review ten days after the day that the contract for the construction of the drain is let or awarded." Article III also provides: "This assessment sheet shall be subject to review as hereinbefore stated ten days after the day of letting the contract."

Article IV, section 1, then provides that, before the day of review, the commissioner shall apportion the per cent of the cost of construction which each tract of land, railroad, city, town, county or irrigation ditch shall bear, and provides the method of apportionment.

Section 2 of Article IV provides as follows: "The owner of any land, ditch or railway assessed for the construction of any drain, who may conceive himself aggrieved by the assessment made by the county drain commissioner, may, within ten days after the day of review provided for in the preceding Article of this Act, appeal therefrom and for such purpose make an application to the district court of the proper county for the appointment of a board of review as hereinafter provided; by serving upon the drain commissioner and by filing with said district court a notice to that effect, and by filing also a bond with such court in the sum of two hundred dollars with one or more sureties to be approved by the clerk of said district court conditioned upon the payment of all costs in case the assessment made by the county drain commissioner shall be sustained. Any county, incorporated city or town assessed a per cent of the cost of the construction of any drain that may conceive itself or themselves aggrieved by the assessment made by the county drain commissioner, may, within ten days after the date of review provided for in the preceding section, appeal therefrom as herein provided. Only one application for a board of review shall be entertained by such district court for any one drain."

Section 3 of the Article provides the manner in which the board shall be appointed, the fixing of the day of hearing, and the qualification of members of the board, and provides for a review of the proceedings establishing such drain by *certiorari*.

It is then provided by section 4 of said Article, as follows: "The board of review shall proceed at the time and place specified in the notice to hear the proofs, and allegations of all the parties in respect to the matter of appeal and shall thereupon proceed to view the lands benefited by such drain and the drainage area, and review all the assessments made by the county drain commissioner on such drain, and if in its judgment there be manifest error or inequality in such assessment, it shall order and make such changes therein as it may deem just and equitable. Should the board of review find upon personal examination that any land, railway, irrigation ditch, city or town, or any portion thereof, has been included in the drain district and assessed, which is not liable to assessment in accordance with the provisions of section 1 of this Article, then said board of review shall omit such land, railway, irrigation ditch, city or town, or such portion thereof, from such drain district and annul the assessment against it or such portion of it. Should the board of review find upon personal examination that there is any tract of land, railway, irrigation ditch, city or town, or any portion thereof, liable to assessment for the construction of the drain in accordance with the provisions of section 1 of this Article, which has not been assessed, it shall add such land or portion thereof to the drain district, and apportion the per cent of the cost to such."

While the language in which these two sections on appeal is couched may be somewhat obscure, in our opinion the purport of these provisions and the intention of the legislature are clear. The manner of perfecting an appeal from the order of the drain commissioner is analogous to that provided for an appeal from the justice court to the district court. Notice of appeal is filed with the commissioner and with the

district court, and the appeal is perfected by the filing of a bond in the sum of \$200 for the payment of costs "*in case the assessment made by the county drain commissioner shall be sustained.*" The appeal being taken, not to the district court, but to a special tribunal to be created under the provisions of the Act, for each special district, it is further provided by the Act that *for that purpose* (the appeal) an application shall be made to the district court for the appointment of a board of review. The application is not a part of the appeal, but made for the purpose of providing the necessary machinery for disposing of the appeal. With this distinction in mind, it is clear that the closing paragraph of the section that "only one application for a board of review shall be entertained by such district court for any one drain" has no reference to the number of appeals which may be taken from the action of the drain commissioner. As declared by the section: "The owner of any land, ditch or railway * * * who may conceive himself aggrieved by the assessment made by the * * * drain commissioner, may * * * appeal therefrom," and "any county, incorporated city or town assessed a per cent of the cost of the construction of any drain that may conceive itself * * * aggrieved * * * may * * * appeal therefrom as herein provided."

By section 4, Article IV, the board of review so appointed on the application of a party who conceives himself aggrieved is given authority to hear and determine all matters connected with the action of the commissioner and from his orders in which an appeal lies, and therefore, to avoid the expense and confusion attendant upon the sitting of numerous boards of review at practically the same time, in the same district, and for the same purpose, the legislature wisely provided that no matter how many parties conceiving themselves aggrieved should appeal and call upon the court to provide for a hearing of their appeals, only one application for the appointment of a board of review should be entertained, and that such board should hear and determine all appeals perfected in

accordance with the provisions of the Act. That such was the clear intention of the legislature is manifest by the opening provision of section 4 of Article IV, that "The board of review shall proceed at the time and place specified in the notice to hear *the proofs and allegations of all the parties in respect to the matter of appeal.*"

It is inconceivable to us that the legislature could have intended that, as contended by counsel for the respondents, on the creation of a large drain district, where all the parties affected thereby, with a single exception, were satisfied with the action of the commissioner and the assessments made, a single person, "conceiving himself aggrieved" as to an unimportant tract of land within the district, could appeal, and thereby throw open the door, closed by the limitation expressed in the Act, and permit the board to review every act and every finding of the commissioner, and to exclude more than ninety-seven per cent of the property assessed for the construction of the work, and thus not only defeat the purpose of the petitioners, but render absolutely worthless the warrants issued for work done in strict compliance with the law and in reliance upon the act of the owners of such land in failing to make timely objection to the inclusion of their lands within the district.

True, the Act provides that the board of review shall have [2] power to review all assessments and correct manifest errors therein, and to exclude land improperly included, as well as to include lands improperly excluded; but such provisions mean no more than that the board has authority to so act in all matters properly before it for *review*. The use of the word "review" throughout the Act is significant, and the statute is plain that the reviewing board is to act only in the "matter of appeal." The word "review" has a well-understood meaning in the law. In 7 Words and Phrases, page 6214, it is said, quoting from *Weehawken Wharf Co. v. Knickerbocker Coal Co.*, 25 Misc. Rep. 309, 54 N. Y. Supp. 566: "'Review,' as used in connection with appellate proce-

dure generally, is defined to mean review on appeal, for that is the only method whereby a *review* may be had." "The word 'review,' when applied to the review by an appellate court of the action of a court of original jurisdiction, has reference to cases which are before the appellate court either on appeal, writ of error or *certiorari*." (*Bentley v. Reynolds*, 190 Mo. 578, 89 S. W. 877.) In this sense the term is used by this court in the case of *First Nat. Bank v. McAndrews*, 5 Mont. 251, 5 Pac. 279: "This is an appellate court, and has jurisdiction to *review* the decisions of the lower court."

In 3 Cyc. 411, it is stated that "It is the general rule that only the rights of parties before the court can be adjudicated on appeal, and the rights of persons who are not parties to the appeal cannot ordinarily be considered." To the same effect is the rule announced in 4 Corpus Juris, page 1112, and again in 15 Corpus Juris, paragraph 93, "Courts," the rule is stated that "A court cannot of its own motion assume jurisdiction in a particular matter; it is necessary that some person should in some legal way invoke its action."

It is suggested by appellant that our statute was adopted almost bodily from Michigan, and that therefore the decision of the Michigan court in *Thomas v. Walker Township Board*, 116 Mich. 597, 74 N. W. 1048, to the effect that the board of review is without power to exclude lands which, in its judgment, are not benefited, is applicable; but, as pointed out by counsel for respondents, the Michigan statute, at the time of that decision, had no such provision as is contained in our statute, and an amendment was therefore made conferring on such board authority to add lands to the district, but the amendment does not confer power to exclude lands. (Sec. 3405, How. Mich. Stats.) The case cited is therefore of little avail here. However, the provisions for an appeal from the action of the drain commissioner, under the Michigan statute are identical with ours, and in the case of *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22, an action for the recovery of taxes paid under protest, the court says: "Plaintiff introduced evi-

dence tending to show that his land was so remote that it was not benefited by the drain. That question could not be raised in a collateral proceeding. The statute provides a way for reviewing the action of the commissioner in this regard, and this action is final. (3 How. Stats., secs. 1740d8, 1740e2; *Brown v. City of Grand Rapids*, 83 Mich. 101, 47 N. W. 117; *Township of Caledonia v. Rose*, 94 Mich. 216, 53 N. W. 927; *Nelson v. City of Saginaw*, 106 Mich. 659, 64 N. W. 499.)"

In *Washoe Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866, this court said: "The statute providing for appeals must be strictly complied with. A failure on the part of the appellant in this regard leaves this court without jurisdiction to entertain the appeal."

The final action of the drain commissioner is an adjudication of the matters therein passed upon, and is, to the same extent as an adjudication by a court, conclusive, whatever errors of judgment may have been committed, in the absence of timely application for a review of his acts by some one of the modes prescribed by the statute. (*Troost v. Fellows*, 169 Mich. 66, 134 N. W. 1011; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841; *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510.)

As constituted by our Act, the board of review is essentially an appellate board or tribunal, established on proper application by the district court to hear and determine all matters properly brought before it in the manner prescribed. Any person interested "who may conceive himself aggrieved" may appeal from the action of the commissioner to this single tribunal established by the court; but each party thus conceiving himself aggrieved must appeal from the action of the commissioner, for on a hearing before the board of review, "the board of review shall proceed at the time and place specified to hear the proofs and allegations of all the parties in respect to the matter of appeal"; in other words, the board has all of the power enumerated in the statute, when those matters are properly before it on appeal taken by par-

ties conceiving themselves aggrieved, and not otherwise. Clearly, then, the board of review is without jurisdiction or authority to hear and determine any matter other than that before it on appeal, to-wit, the assessment against Stillwater county, and is without jurisdiction to make the order of exclusion of territory which it will, it is conceded, make unless the writ prayed for shall issue.

The judgment of the district court is reversed, with direction to the court to issue its writ of prohibition as prayed for in the petition.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

STATE EX REL. SCOTT, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 4,682.)

(Submitted September 27, 1920. Decided October 4, 1920.)

[192 Pac. 829.]

Supervisory Control — Contempt — Divorce — Failure to Pay Alimony—Commitment to Jail—When Void.

Contempt—Failure to Pay Alimony—Supervisory Control—Writ Does not Lie, When.

1. The writ of supervisory control does not lie to relieve one from punishment under an order finding him guilty of contempt for failure to pay temporary alimony, where he neither made application for a modification or revocation of, nor appealed from, the order awarding the alimony.

Same—When Inability to Comply not Defense.

2. Inability to comply with an order awarding alimony *pendente lite* was no defense to a charge of contempt where, after the court had adjudicated his ability to pay, contemnor voluntarily encumbered the property disclosed to the court, and thus put it out of his power to comply with the order.

[Inability to comply with order or decree for alimony as defense to charge of contempt, see note in 15 Ann. Cas. 945.]

Same—Defense—Estoppel.

3. The record not disclosing under what representations and circumstances the wife of contemnor signed the mortgage referred to above, the contention that she was estopped to claim that by mortgaging his property he purposely disabled himself from complying with the court's order directing payment of temporary alimony to her *held* without merit.

Same—When Order Committing Contemnor to Jail Void.

4. *Held*, on supervisory control, that the authority of the district court to commit a contemnor to jail until its order directing him to pay temporary alimony should be complied with was, under section 7319, Revised Codes, contingent upon a showing that it was within his power to comply, and that, therefore, the record showing that at the time of his commitment he was financially unable to obey the order, his commitment was void.

Original application for writ of supervisory control, on the relation of Paul Scott against the District Court of the Thirteenth Judicial District in and for the County of Yellowstone and Honorable A. C. Spencer, a Judge thereof. Writ issued.

Cause submitted on briefs of counsel.

Messrs. Collins, Campbell & Wood, for Relator.

The theory of the relator is that the contempt order of June 24, 1920, was improper and void for the following reasons, to-wit: First, that the record shows a complete inability upon the part of the relator at all times since May 15, 1920, to comply with the alimony order here involved; and, second, that the record shows that the plaintiff has no meritorious cause of action in the court below against the relator herein, and that the action in the lower court is not being prosecuted in good faith.

As preliminary to a discussion of these matters, we take the position that the relator is in no wise concluded by the alimony order of May 15, 1920.

In 2 Black on Judgments, second edition, paragraph 692, the author says: "The doctrine of *res judicata*, in its strict sense, does not apply to incidental or interlocutory orders

The question of inability to pay alimony as defense to contempt is discussed in notes in 24 L. R. A. 433; 30 L. R. A. (n. s.) 1001; L. R. A. 1917C, 97.

made in the progress of a cause." (*Gay v. Gay*, 146 Cal. 237, 79 Pac. 885; *Woodall v. Woodall*, 136 Ga. 700, 71 S. E. 1099.)

It is also settled law that if the order of May 15, 1920, was void, as we contend is the case, it was not necessary for relator to appeal from the order to obtain relief, but that he could attack it directly, as was done by the motion incorporated in his return to the order to show cause, or could allege its invalidity as a defense in any proceedings taken to enforce the order. (29 Cyc. 1520, par. 4.)

In *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753, this court has approved the rule above in the case of *Kamp v. Kamp*, 59 N. Y. 212, involving an alimony order which, it was contended, was void and made without jurisdiction.

Furthermore it is settled law that the respondent court had the authority to vacate the order of May 15, 1920, since the application was made at the same term (29 Cyc. 1518); and apart from this fact, the order itself permits a modification during the progress of the action. Therefore, with the invalidity of the order of May 15, 1920, established, as we contend it is by the record herein, and the court having the power to modify or annul the order, the relator was not concluded by the order and it affords no basis for the contempt order of June 24, 1920.

Inability to comply with an alimony order having been established, this was a good defense to a charge of contempt for a violation of the alimony order. (*State ex rel. McLean v. District Court*, 37 Mont. 485, 15 Ann. Cas. 941, 97 Pac. 841). We can find no justification whatever in the record for the entry of the order of June 24, 1920, for inability to pay clearly appears, and this inability is not the result of voluntary or contumacious acts of the relator. If it is contended that the act of the relator, subsequent to the order of May 15, 1920, in mortgaging the eighty acres of dry grazing land, was a voluntary and contumacious act, it should be borne in mind, first, that the total value of the land so mortgaged does not exceed \$480, and that the alimony required to be paid

under the order of May 15, 1920, aggregates the total sum of \$450, plus \$60 per month; that the relator so acted upon the insistent demands of the creditor bank to save a foreclosure that would wipe out all of his property; and that last, and most important of all, the plaintiff in the action in the court below, for whose benefit the alimony order was entered, approved of the action taken by the relator in this respect and indorsed it by signing the notes and mortgage with the relator.

In connection with any such contention, if made, see 1 Bailey on Jurisdiction, paragraph 304s. Under the doctrine announced by Bailey, a violation of the order of May 15, 1920, with the facts as they exist in the record, would be but a civil contempt at most; and since a civil contempt consists in a failure to do something ordered to be done in a civil action for the benefit of the opposing party therein, we submit that the consent of the opposing party to the act which necessarily results in a failure to do the thing ordered (and the opposing party herein—the plaintiff in the court below—has consented) is such a waiver that contempt proceedings cannot properly be instituted, and there is further wanting, under such circumstances, an essential element of a contempt—that is, disobedience, for the order must be deemed to have been modified by the waiver and not disobeyed. Neither under such circumstances can the failure of one to comply with an alimony order be deemed willful, for the resultant inability to comply with the order is brought about through co-operation with the person for whose benefit the order was made, and not for the purpose of maliciously depriving such other party of anything, or of defying the court which made the order. To hold a person guilty of contempt under these circumstances would, indeed, be to imprison for a mere debt, for no element of willful disobedience exists.

The action in the district court is not being prosecuted in good faith and plaintiff has no meritorious cause of action for a divorce. The law is that a court is without jurisdiction

to make an order for alimony *pendente lite* where it appears, as we contend it here does, that the divorce action in which the order for alimony is sought is not being prosecuted in good faith and that the plaintiff therein has no meritorious cause of action against the defendant. The very terms of our alimony statute (sec. 3677, Revised Codes) so imply, for an action for divorce is not in reality pending if the plaintiff therein has no meritorious cause of action. The authorities hereinafter cited establish this rule beyond question. (*Countz v. Countz*, 30 Ark. 73; *Whitney v. Whitney*, 22 How. Pr. (N. Y.) 175, 177; *Brindley v. Brindley*, 121 Ala. 429, 25 South. 751, 752; *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414; *Dougherty v. Dougherty*, 8 N. J. Eq. 540; *Monk v. Monk*, 30 N. Y. Super. Ct. 153; *Slocum v. Slocum*, 86 Ark. 469, 111 S. W. 806, 807; *State ex rel. Lloyd v. District Court*, 55 Wash. 347, 25 L. R. A. (n. s.) 387, 104 Pac. 771, 773; *Glasser v. Glasser*, 28 N. J. Eq. 22; *Jones v. Jones*, 2 Barb. Ch. (N. Y.) 146; *Snyder v. Snyder*, 3 Barb. (N. Y.) 621; *Burrow v. Burrow*, 6 Lea (Tenn.), 499; *Cooper v. Cooper*, 185 Ill. 163, 56 N. E. 1059; *Beekman v. Beekman*, 53 Fla. 858, 43 South. 923; 19 Corpus Juris, "Divorce," pars. 510, 519.)

Mr. E. E. Enterline and *Mr. J. W. Snellbacher*, for Respondents.

Relator made no application to the district court to vacate or modify the order of May 15, 1920, nor has he appealed from it, hence cannot now complain. The right to appeal is expressly given by our statute and upheld by numerous decisions of this court. (Rev. Codes, sec. 7098; *In re Finkelstein*, 13 Mont. 425, 34 Pac. 847; *State ex rel. Nixon v. Second Judicial District Court*, 14 Mont. 396, 40 Pac. 66; *State ex rel. Heinze v. Second Judicial District Court*, 28 Mont. 227, 72 Pac. 613; *Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6.)

If the divorce action was not being prosecuted by the wife in good faith, the relator should have made that showing at

the hearing had on May 15, 1920. Having failed so to do and having failed to appeal from the order of May 15, 1920, he was in no position to successfully attack the order of May 15, 1920, by the evidence which he sought to introduce in the contempt proceedings.

It is next contended by counsel for relator in their brief that if the order of May 15, 1920, was void, the relator had a right to attack it as he did in the contempt proceedings, and authorities are cited in support of such contention, but unfortunately in this case counsel for relator are confronted with a valid order. It is elementary and authorities need not be cited to show that there is a marked distinction between a void order and a voidable order or an order erroneously made upon a hearing in some action. This court is in no position to know what evidence was adduced at the hearing had on May 15, 1920, and even if it was, the same could not be considered in an application for a writ of supervisory control.

The facts in the case of *State ex rel. McLean v. District Court*, 37 Mont. 485, 15 Ann. Cas. 941, 97 Pac. 841, cited by counsel for relator in their brief in support of their contention that the contempt order under review is invalid, are clearly distinguishable from the facts in the case at bar.

There is no merit whatever in the contention that because the wife joined in a mortgage to secure an indebtedness of the relator theretofore secured by a mortgage to a bank and in which last mortgage encumbered lands owned by relator were included, she thereby waived her right to receive alimony, suit money and counsel fees in the divorce action. The relator's own testimony discloses that he never asked his wife to sign the mortgage but that she was requested so to do by some of the bank officers, and he also testified that he did not advise the bank that he was ordered to pay his wife alimony.

It is next contended that if the record before this court establishes that the action in the lower court is not being

prosecuted in good faith or if the plaintiff in the action has no meritorious cause of action against the relator, the theory of relator's counsel is that the alimony order of May 15, 1920, was void and was made without jurisdiction, and that consequently the relator cannot be charged with contempt for violating the order. The record does not establish any of those matters, and even if it did, the same would have to be reviewed on appeal and not by a writ of supervisory control. Those matters would in no sense affect the jurisdiction of the trial court to make the order but might establish the fact that the order made against such showing would be erroneous. In this connection the counsel for relator in their brief cite the case of *Rumping v. Rumping*, 41 Mont. 33; 108 Pac. 10, in support of their contention that alimony cannot be allowed where it appears to the court that the action has not been instituted in good faith and that the wife has no meritorious cause of action against the husband. Counsel for relator entirely overlook the fact that the proper time to make such showing would be at the time of the hearing for the allowance of alimony and not in the contempt proceedings instituted after the order of allowance has been made. Whether such showing was made or not does not and could not appear in this proceeding. Authorities are cited and quotations made by counsel for relator in their brief concerning the allowance when there is a lack of good faith on the part of the wife in the prosecution of a divorce action, but in none of them do we find that the action of the trial court can be reviewed in a contempt proceeding instituted for the failure of the husband to comply with an order allowing the wife alimony.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On application for writ of supervisory control. On June 24, 1920, relator was adjudged guilty of contempt for failure to comply with an order of the respondent court, made May

15, 1920, directing the payment of alimony *pendente lite*, suit money, and attorney's fees in divorce proceedings instituted by the wife of relator, and was ordered committed to jail until such order is complied with. In his return to the citation, relator, who will be hereafter referred to as the defendant, set out as cause why he should not be punished: First, that he was without means, without employment, and without property which might be sold, mortgaged or pledged; and, second, that the allegations of the complaint in the divorce proceeding, to the extent of the denials filed at the time of making the return, were untrue, that plaintiff had not a meritorious cause of action, and that the suit was not prosecuted in good faith.

On the hearing, defendant testified that he was a stockman, and could not find employment as such. He, however, testified that he had a prospect of employment near Melville, which employment would be permanent, but "did not think it best to go to work right away, because I had to go back and forth here to Billings on this business." On cross-examination he admitted that farmers were short-handed, but stated that he knew little of such work. It appears further from the transcript that, at the time the court made the order for alimony, *etc.*, defendant was the owner of 160 acres of land and forty-one head of cattle, of which eighty acres of the land and all of the cattle were mortgaged to secure a note of approximately \$5,000, and that the unencumbered eighty acres were grazing land of the value of \$6 per acre. It further appears that interest, amounting to the sum of \$248.60 was past due on the mortgage note, and that, subsequent to the making of said order, defendant, in order to secure the payment of such interest and a like amount falling due June 30, 1920, executed and delivered to the bank his note and mortgage on the additional eighty acres, and that the plaintiff joined with him in the mortgage.

In support of the second contention of defendant, he and his father testified, over the objection of counsel, that the

allegations of the complaint were false. No evidence was introduced on behalf of the plaintiff.

Counsel for defendant, relator herein, contends that the [1] original order should not have been made, in the light of the disclosures made on the hearing of the contempt matter, citing in support of his contention the opinion of this court in the case of *Rumping v. Rumping*, 41 Mont. 33, 108 Pac. 10, to the effect that "No allowance for temporary alimony should be made, if it appears of record that the suit of the applicant, or the defense interposed by her, as the case may be, is without any just or reasonable foundation, so that there is no probability of her success." However, on what evidence the court granted the original order does not appear in the record here; certainly, the matters set up in the answer filed at the time of making return to the citation for contempt were not before the court, present counsel was not employed until after the citation, and what took place before the date thereof is not before us. All that we have to consider are the facts presented by the record, to-wit, that an order was made, which order recited that it was subject to modification. The defendant made no attempt to have the order modified or annulled, but proceeded to disregard it.

Under similar circumstances and like contentions as are here made, in the case of *State ex rel. Bordeaux v. District Court*, 31 Mont. 511, 79 Pac. 13, this court said of the adjudication of contempt and commitment until the order of the court was complied with: "The action of the court was correct. If he could not, by stress of circumstances, comply with the order of the court, it was his duty, for his own protection, to go into court, relate the circumstances, and pray for a revocation or modification of the order directing him to pay alimony." So here, such was the plain duty of defendant, or, if, as contended by counsel in his second ground stated, defendant was of the belief that the order and decision of this court were contrary to the evidence, he should have appealed therefrom, as such an order is, in effect, a judgment

from which an appeal lies. (*In re Finkelstein*, 13 Mont. 425, 34 Pac. 847.) Having failed to either apply to the court for a revocation or modification of the order, or to appeal from the judgment of the court, it was the plain duty of the defendant to obey its mandates.

The court had jurisdiction of the subject matter of the original application and of the defendant, and, as declared in *State ex rel. Coad v. District Court*, 23 Mont. 171, 57 Pac. 1095, "the judge had the power to decide the questions involved, wrong as well as right," and, even though the court may have reached an erroneous conclusion on the facts presented, "it was his [defendant's] duty to obey the writ, at all hazards, until the judgment awarding it could be reviewed and annulled on appeal." Having failed to do so, the district judge was clearly within the proper exercise of his power in punishing failure to obey the order.

The case of *State ex rel. Mannix v. District Court*, 51 Mont. 310, 152 Pac. 753, cited by counsel, to the effect that "one is not bound to appeal from a void order, but may resist it and assert its invalidity at all times," is of no avail to the defendant, as there the order complained of was void for want of jurisdiction of the court to make it; here, as in the *Coad Case*, the court had jurisdiction to make the order, and the only question presented is: Did the court err in making it under the evidence presented? This question was not raised in any proper proceeding in the district court, unless by the motion to annul, made at the time of return to the citation for contempt; and it may well be that, in overruling that motion, the court invoked the rule that "he who comes into a court of equity must come with clean hands."

It is contended by counsel that a showing of inability to [2] comply with the order is a good defense to a charge of contempt, citing *State ex rel. McLean v. District Court*, 37 Mont. 485, 15 Ann. Cas. 941, 97 Pac. 841. But the facts showing inability to comply, in the *McLean Case*, and on which the court held that the defendant was purged of contempt,

were very different from those here presented; there the defendant had acted in good faith on an order of the court, and was in nowise responsible for the action of the court in later setting aside the original order. Here the court had adjudicated defendant's ability to pay, and he thereafter voluntarily encumbered the property disclosed to the court, from which he could have secured funds to, at least partially, comply with the order of the court. The case comes clearly within the rule laid down in the *Bordeaux Case*, cited, that upon failure to apply to the district court for a revocation or modification of the order, the writ of supervisory control will not lie to relieve a defendant from punishment for noncompliance with such order.

It is further contended that the plaintiff in the divorce [3] action was in no position to complain of the act of the defendant in mortgaging the property theretofore unencumbered, because she approved of that act, and indorsed it by signing the note and mortgage complained of. If the record disclosed knowledge on the part of the wife that the mortgage was given to secure the payment of interest due the bank, the fact might well be considered by the court as acquiescence in the act of the defendant, and might change the court's view of the entire proceeding; but the record is silent as to what representations were made to the plaintiff, and under what circumstances she signed the note and mortgage. So far as the record discloses, she may be presumed to have signed on the reasonable assumption that the presentation of a note and mortgage on the only available property in the possession of the defendant, shortly after the court had ordered the payment of alimony, was but a step toward compliance with the order, and that the proceeds of such transaction would be immediately applied in conformity with the order. In view of the record on the subject, such act on her part has no significance or weight in determining the guilt or innocence of the defendant.

If the foregoing constituted all the questions involved in [4] the application, we should have no hesitancy in denying the writ and dismissing this proceeding; but the final contention of relator constitutes, in our opinion, an insurmountable barrier to such disposition of this matter. That contention is that, in the light of the showing made, the order committing the defendant to jail until the order of May 15, 1920, is complied with, violates the express provisions of our statutes on the subject of contempt.

There are, in this state, but two provisions of the statute controlling the court's disposition of contempt matters: Section 7318, Revised Codes, provides that, if it is adjudged that the contemnor is guilty of contempt, "a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both." Section 7319 provides that: "When the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he shall have performed it." The first provision is for the *punishment* of the offender; the second provides a method of enforcing the court's order.

The respondents herein proceeded under the authority of the latter provision; but we search the record in vain for any intimation that the act to be performed, to-wit, the payment required by the order, "is yet in the power of the person to perform"; indeed, the whole record negatives such a conclusion and clearly sets forth that, no matter what his condition at the time of making the order, and no matter how he was divested of the power to meet its requirements, at the time the contempt judgment was rendered the defendant was absolutely incapable of meeting the payments required, or any part thereof.

The power of the court to punish disobedience to its orders by imprisonment is so well settled that the citation of authorities is unnecessary. But that power depends upon a proper showing; and it is also well settled that, even in the absence

of such a statute as ours, the court is without authority to commit the contemnor until the court's order is complied with, where that requirement is the payment of money, if it appears that he is not able to pay. (*State v. Brewer*, 38 S. C. 263, 37 Am. St. Rep. 763, note, 19 L. R. A. 362, 16 S. E. 1001.)

Bailey on Jurisdiction, volume 1, paragraph 304s, quoting from a New York case, says: "To hold that the petitioner, though penniless, must suffer a life imprisonment for debt because of the peculiar form in which the imprisonment was imposed, would be gross violation of the plain intent of the Code." And, if the court is vested with such authority, of what avail to the plaintiff in the divorce proceeding is the continued imprisonment of the defendant?

However, aside from the consideration of precedent or the dictates of reason or justice, our statute is controlling, and its provisions are plain and certain: The court's authority, under section 7319, is contingent upon a showing that "the act is yet within the power of the person to perform," and we cannot enlarge upon the statute.

Counsel for respondents contend that the *Bordeaux Case*, *supra*, is an authority to the contrary; but we find no conflict between the declarations in that case and the views here expressed; it there appeared that the order violated required the payment of \$100 per month, and that the defendant possessed property valued at \$60,000 and had an income of more than \$400 per month. Here the undisputed evidence is that defendant had neither money, property, income nor employment. From the evidence adduced, the court might well have determined that the acts of the defendant in placing his unencumbered property out of the reach of process, in failing to even attempt to raise the amount required, and in failing to secure employment, were willful, voluntary and contumacious, and could have thereupon declared him guilty of contempt, and proceeded to fix his punishment in accordance with the provisions of section 7318. The court was, however, with-

out authority to commit relator to jail until he should perform an impossible act.

For the reasons above stated, the writ will issue, commanding the said district court to annul its order of June 24, 1920, but with direction to the court to enter its judgment in conformity with the provisions of section 7318, if, in its opinion, the facts, as heretofore suggested, warrant such a judgment.

**MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and COOPER concur.**

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
OCTOBER TERM, 1920.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, THE HON. JOHN HURLY, THE HON. JOHN A. MATTHEWS, THE HON. CHARLES H. COOPER,	}	Associate Justices.
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HINZEMAN ET AL., APPELLANTS, v. CITY OF DEER LODGE
ET AL., RESPONDENTS.

(No. 4,633.)

(Submitted September 18, 1920. Decided October 18, 1920.)

[193 Pac. 395.]

*Cities and Towns—Special Improvement District—Creation—
Resolution of Intention—“Passage” of Resolution—Absence
of Approval by Mayor—Premature Publication—Effect.*

**Cities and Towns—Special Improvement Districts—Resolution of Intention
—Jurisdiction.**

1. A resolution of intention, in due form and properly adopted, is the basis for subsequent proceedings looking to the creation of a special improvement district; without it, passed substantially as the statute requires, municipal authorities are without jurisdiction to make the contemplated improvement.

Same—Resolution of Intention—Absence of Approval by Mayor—Effect.

2. *Held*, under section 3265, Revised Codes, that a resolution of intention not approved by the mayor until seventeen days after its

publication, was not duly "passed," that its publication was therefore premature and amounted to no publication, rendering all subsequent proceedings thereunder void.

Appeal from District Court, Powell County; George B. Winston, Judge.

ACTION by Henry Hinzeman and J. A. Kerruish against the City of Deer Lodge and others. From an order denying an application for an injunction, plaintiffs appeal. Reversed.

Cause submitted on briefs of Counsel.

Mr. S. P. Wilson, for Appellants.

Mr. W. E. Keeley, for Respondents.

MR. JUSTICE COOPER delivered the opinion of the court.

On December 23, 1919, the city council of the city of Deer Lodge adopted Resolution No. 204, signifying its intention to create a special improvement district for the purpose of paving Main Street, under the provisions of Chapter 142 of the Session Laws of 1915. The notice therein prescribed appeared in the issue of the "Powell County Post" of January 2, 1920, published and circulated in the city of Deer Lodge and elsewhere. A protest in writing was made by a majority of the property owners affected, including the plaintiffs, against the creation of the district. It was filed in the office of the city clerk upon the nineteenth day of January, 1920, and by the city council overruled. It appears that the resolution of intention, at the time it was published, had not been and was not signed by the mayor until the date on which the protest was filed. The trial court found that Resolution No. 204 was legally passed and adopted, although the notice of intention was published prior to the approval of the resolution by the mayor. Application for an injunction was instituted against the mayor and council of the city in the court below to stop the construction of the improvements, which injunction the

district court denied. From that order this appeal is taken. The invalidity of the proceedings of the city council is urged as the principal ground of reversal.

The mayor did not approve the resolution of intention until January 19th, seventeen days after its publication. This omission appellants contend is jurisdictional, rendering the proceedings insufficient to set the executive machinery of the city in motion, and an infirmity invalidating all the subsequent proceedings creating the improvement district and the making of a contract for the doing of the work. If this point is well taken, the order denying the injunction must be annulled.

A resolution of intention, in due form and properly adopted, [1] is the fundamental basis upon which all further proceedings must stand. It is the essential thing which clothes the city authorities with jurisdiction to proceed with the proposed improvements. The very meaning of the word "jurisdiction" is power to hear and determine; and if no resolution of intention was passed, substantially as the statute requires, no power existed in the municipal authorities to let the contract or take any of the various steps necessary to create a valid improvement district. This court had occasion to deal with this important question in the case of *Shapard v. City of Missoula*, 49 Mont. 269, 141 Pac. 544. There the Chief Justice, in a learned and exhaustive opinion, analyzes the statute and lays down fundamental principles vitally affecting the question here presented. In that case no resolution of intention at all was passed by the mayor and city council. The proceedings necessary to create the district were enacted, but the antecedent requisite—the passage and approval of the resolution of intention—was ignored altogether. It was held that the mode of exercising the power granted to a municipal corporation pointed out by the statute must be pursued in all substantial particulars before a municipal corporation can exercise the powers the statute in express words grants. Concerning the particularity with which the mandates of the

statute are to be followed, the reasoning of the Chief Justice is so pertinent to the present inquiry that we adopt the following from that opinion: "The statute having defined the measure of the power granted, and also the mode by which it is to be exercised, the validity of the action of the legislative body of the municipality must be determined by an answer to the inquiry whether it has departed substantially from the mode prescribed. Particularly is this true when it is engaged in making street improvements, the expense of which is to be a charge by assessment upon the property included in a special improvement district. The power to proceed at all is a restricted and qualified power, and may be exercised only upon the terms granted. The law on the subject is well settled, so well, indeed, that no municipal officer should be ignorant of it, or fail to understand that a special improvement district cannot be created without observance of every requirement of the statute on the subject.

"The resolution of intention is the primary step to be taken in every instance. It is the basis of the whole proceeding. It, with a notice of its adoption, is a condition precedent; nothing may be substituted in its place, and, though the proceedings may in all other respects conform to the requirements of the statute, the omission of it is fatal and renders all the subsequent proceedings nugatory. (Page & Jones on Taxation, secs. 777, 830; McQuillin on Municipal Corporations, secs. 1848, 1849; 28 Cyc. 978; *San Jose Imp. Co. v. Auzerais*, 106 Cal. 498, 39 Pac. 859; *Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454.) To hold that a resolution creating a district *in limine*, though notice of it is given, is a compliance with the statute, would be equivalent to a holding that the legislature did not mean what it said, and intended the municipality to wholly disregard the prescribed procedure and proceed by any mode it may deem advisable.

"Nor is the proceeding aided in any way by the failure of any property owner to file with the clerk his written objection to the regularity of the proceedings, within sixty days

after the letting of the contract. The conclusive presumption of waiver declared in section 13 of the Act is predicated upon the passage of the resolution of intention and the publication of the required notice as a condition precedent; and, though the section may be regarded as having a curative purpose and may accomplish this purpose so far as regards other irregularities in the proceedings, it cannot supply jurisdiction when it has not been acquired by observance of the antecedent steps necessary to acquire it. (Page & Jones on Taxation, sec. 981; *Comstock v. City of Eagle Grove*, 133 Iowa, 589, 111 N. W. 51; *Smith v. City of Buffalo*, 159 N. Y. 427, 54 N. E. 62.)”

Mr. Justice Holloway, in the later case of *Johnston v. City of Hardin*, 55 Mont. 574, 179 Pac. 824, further emphasizes the necessity of a substantial adherence to the requirements of the statute as follows: “These proceedings have for their ultimate purpose the subjection of the property within the district to taxation to bear the cost of the improvements. They are *in invitum*, and in recognition of these facts the legislature has provided a complete, but direct, plan of procedure, designed to protect property from confiscation and at the same time permit beneficial improvements to be made. It has provided for notice to the property holder, and an opportunity for him to be heard before the proposed district is created, and it has constituted the city council a special tribunal to conduct the hearing. This tribunal is clothed with limited powers only, and no presumption in favor of its jurisdiction will be indulged. The statute measures its authority and compliance with the terms of the statute is a condition precedent to its right to act. (*State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695.)

“The notice is the process by which the council brings the interested property owner before it, and service of the process is indispensable unless service is waived. (*Davidson v. Clark*, 7 Mont. 100, 114 Pac. 663.) Service is made by publishing a notice containing the matters enumerated in section 3 above,

and by mailing to every property owner affected, a copy of the notice as published. The purpose of serving the notice is (1) to apprise the property owner that his property is within the proposed district and liable to assessment if the district is finally created; (2) to inform him of the general character of the contemplated improvements and the probable cost of the same; and (3) to advise him of the time when and place where he may be heard.”

And again: “The statutes above not only qualify and limit the powers which the city council may exercise, but they define with particularity the mode in which the restricted authority may be used, and compliance with their provisions is the *sine qua non* to the creation of a special improvement district for making improvements the expense of which is to be a charge against the property included. (*Shapard v. City of Missoula*, above; *Cooper v. City of Bozeman*, 54 Mont. 277, 169 Pac. 801.) The statutes define the contents of the notice and the manner of service, and declare that the giving of this notice is one of the steps necessary to be taken before the city council is clothed with jurisdiction to order the work done, and no argument, however specious, can excuse a failure to observe their mandates.”

We come now to the question upon which the appeal turns, [2] viz.: Was the resolution “passed” within the meaning of the statute, without the approval by the mayor? The solution of this question depends upon whether the mayor is such an integral part of the law-making power of the city council as to make his concurrence in legislative action essential to the validity of the resolution of intention. To determine this question resort must be had to the general statutes prescribing the conditions to be observed before the official acts of the city government can be said to be valid.

Section 3265 of the Revised Codes reads as follows: “All ordinances, by-laws and resolutions must be passed by the council and approved by the mayor, or the person acting in his stead, and must be recorded in a book kept by the clerk

called 'the Ordinance Book,' and numbered in the order in which they are passed, and take effect from and after their passage, except as otherwise ordered, and no ordinance shall be passed containing more than one subject, which shall be clearly expressed in its title, except ordinances for the codification and revision of ordinances."

This language is broad enough to make the approval by the mayor of "all ordinances, by-laws and resolutions" indispensable to their validity; and, so far as our examination discloses, none of the later statutes have qualified the plain mandate of section 3265 in that respect. This view is fortified by the last legislative expression on the subject of municipal improvements, found in Chapter 142, Laws of 1915. By section 9 of that Act, notwithstanding the failure of any city or town council, in creating, or attempting to create, special improvement districts, to proceed in the manner required by Chapter 89 of the Acts of the Thirteenth Legislative Assembly (Laws 1913), validity is given to "all special improvement districts" created or attempted to be created since March 14, 1913: "Provided, however, that a resolution of intention to create, or a resolution creating or attempting to create any such district, was duly and properly passed and adopted by the city or town council of any such city or town, and approved by the mayor thereof, prior to giving notice thereof."

It is significant that, twenty years after the enactment of a general law specifying the particulars to be observed in the passage of municipal legislation and the manner in which the record should speak in those matters, the legislative assembly saw fit, by proviso in a statute intended to validate all city and town improvements made since 1913, to reiterate necessity for the concurrent executive act of approval by the mayor before any ordinance, by-law or resolution could effect a cure in proceedings of this character. This must be held to negative the thought that so important a step in the jurisdictional conditions precedent can be omitted.

Publication of the notice of resolution of intention in question before executive approval by the mayor was therefore premature, amounted to no publication at all, and renders void all proceedings subsequent thereto. From this it follows that the refusal of the trial court to grant the injunction was reversible error. The order is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HURLY concur.

Rehearing denied November 17, 1920.

PHILBRICK, APPELLANT, v. AMERICAN BANK & TRUST
CO. ET AL., RESPONDENTS.

(No. 4,566.)

STATE EX REL. PHILBRICK, RELATRIX, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 4,664.)

(Submitted September 17, 1920. Decided October 18, 1920.)

[193 Pac. 59.]

Estates of Deceased Persons—Testamentary Trusts—Termination — Jurisdiction — Equity—Wills—Construction—Supervisory Control.

Testamentary Trusts—Termination—Exclusive Jurisdiction.

1. *Held*, that section 7698, Revised Codes, confers exclusive jurisdiction upon the district court when sitting as a probate court, to determine whether the purpose of a testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution.

[Jurisdiction of probate court to administer testamentary trust, see note in 21 Ann. Cas. 255.]

Probate Courts—Extent of Jurisdiction.

2. While the jurisdiction of the district court, when exercising its probate powers, is special and limited, depending upon the provisions of the Code, yet by implication it also possesses all the powers in-

cidentally necessary to an effective exercise of the powers expressly conferred.

District Courts—Equity Power—When not to be Invoked.

3. The equity power of the district court may not be invoked by a litigant to obtain any relief when a plain, speedy and adequate remedy is afforded in the ordinary course of law.

Same.

4. Since section 7698, Revised Codes, affords a plain, speedy and adequate remedy for the termination of testamentary trusts in probate proceedings then pending before the district court, a demurrer to a complaint in equity seeking the same relief was properly sustained and the cause dismissed.

Supervisory Control—Availability of Remedy by Appeal—When not Bar to Writ.

5. The fact that an appeal lies from an order sought to be annulled on application for writ of supervisory control, is ordinarily a conclusive reason for denial of the application; where, however, the facts alleged make out an exigent case and it is apparent that the appeal will not afford adequate relief it is sufficient to warrant action by the supreme court.

Testamentary Trust—Wills—Construction.

6. A will under which all of testator's estate was bequeathed to one of his sisters to be held in trust for another who was to receive a stated amount each year for life, the trustee to have what remained at the death of the beneficiary, construed, and held that it was the intention of the testator that the trust should continue during the life of the beneficiary and that therefore the latter, as only heir of the trustee, was not entitled to have the entire estate delivered to her on the death of the trustee.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

SUIT by Lavin C. Philbrick against the American Bank & Trust Company and others to have a trust declared terminated and the trust estate delivered to her. Decree for defendants, and plaintiff appeals. After appeal, plaintiff made application to the supreme court for writ of supervisory control to annul an order of the district court dismissing the suit. Judgment affirmed, and motion to quash order to show cause sustained.

Messrs. Galen, Mettler & Toomey, Mr. A. H. Gray and Mr. Stephen J. Cowley, for Appellant, in Cause No. 4,566, submitted briefs; Mr. Gray, Mr. Cowley and Mr. Albert J. Galen argued the cause orally.

According to our interpretation of the provisions of this will, the testator's property vested in the appellant at the

time of the testator's death, and under the terms of the will and in view of the provision of section 4788, Revised Codes, she could not be divested of the estate except upon her death. The death not having occurred, and the death of the contingent remainderman having occurred, it would seem as if the absolute title now reposes in appellant. This is especially true since the question as to creditors' rights does not arise herein.

It is not only the rule of the Codes but is likewise the rule of equity that titles should vest at the earliest possible period. "For many reasons, not the least of which are that testators usually have in mind the actual enjoyment rather than the technical ownership of their property, and that sound policy as well as practical convenience requires that titles should be vested at the earliest period, it has long been a settled rule of construction in the courts of England and America, that estates, legal and equitable, given by will, should always be regarded as vesting immediately unless the testator has by very clear words manifested an intention that they should be contingent upon a future event." (*McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015, 5 Sup. Ct. Rep. 652 [see, also, *Rose's U. S. Notes*].)

That the time of payment was delayed or postponed by the testator in no manner disturbs the contention that the estate vested in the appellant at the death of the testator. "Where the time of payment or distribution is merely postponed for the convenience of the fund or property, or to let in others, the vesting will not be deferred until that period." (*Tayloe v. Mosher*, 29 Md. 443; 2 Williams on Executors, 7th ed., 1344.)

"Where, in the case of such a legacy, words of contingency or condition are used, which may be construed as applying either to the gift itself or to the time of payment, courts are inclined to construe them as applying to the time of payment, and to hold the gifts as vested." (*Dale v. White*, 33 Conn. 294; *Williams v. Williams*, 135 Wis. 60, 115 N. W. 342.)

There is nothing whatever to be gained by a continuation of the trusteeship in this case except such monetary benefits as are being enjoyed by the trustee. Each day the trust continues the estate is being dissipated to the extent of the trustees' charges for administering the trust. This ought not to be permitted to continue.

That the court possesses ample power to terminate this trusteeship is evidenced by an abundance of respectable authority. (*Eakle v. Ingram*, 142 Cal. 15, 100 Am. St. Rep. 99, 75 Pac. 566; *Perry on Trusts*, sec. 920; 39 Cyc. 96-98; *Thompson on Wills*, sec. 357.) "An active trust will not be continued for the mere benefit or the pleasure of the trustee where it has no further object to accomplish for the benefit of the *cestui que trust*." (*Ogden's Appeal*, 70 Pa. St. 501; *Kohtz v. Eldred*, 208 Ill. 60, 69 N. E. 900; *Slater v. Hurlbut*, 146 Mass. 308, 15 N. E. 790.)

If it were true that some sort of an estate did vest in Helen Philbrick by virtue of the provisions of the will, which we deny, her death prior to that of her sister created a merger of all titles and interests in the latter and by reason thereof, if for no other reason, appellant has the right to maintain this action and have the estate freed from the trust.

"Whenever a great estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase it is said to be merged in the greater." (16 Cyc. 665-667; 39 Cyc. 103.) We have been able to discover a case very similar to the present one, wherein our contention was sustained, and submit the same to the court's consideration. (See *In re Dekay*, 4 Paige (N. Y.), 403; also, *Neely v. Phelps*, 63 Conn. 251, 29 Atl. 128.)

Mr. I. W. Church and *Mr. Fletcher Maddox*, appearing as *amici curiae*, submitted a brief; *Mr. Maddox* argued the cause orally.

To terminate a trust clearly created by will, something stronger is required than the death of the person entitled to

the remainder. The plaintiff assumes that because of the third clause providing that the estate should descend to Helen in the event of Lavin predeceasing her, the converse of the proposition is also true and that Helen having predeceased Lavin, the estate immediately descends to the latter. But this would write a new will for Samuel Philbrick. He created a trust estate for a particular purpose,—the support of his sister as long as she lived and the trust fund lasted. The purpose for which the trust was created is still existent. Lavin Philbrick is still living; the trust fund still exists. Now, because the person who by the will would succeed to the trust fund has deceased, it is contended that the trust should therefore cease and the fund be delivered to the trustee. But testamentary trusts are not terminated in this manner. Suppose the will did not contain clause 3 at all and no provision was made for the disposition of the trust fund in the event of the death of Lavin, then clearly the death of Helen could not operate to terminate the trust, and it would continue as long as Lavin lived and the fund remained unexhausted, and both sisters dying before the fund was exhausted, it would pass to some remote heirs.

Trust estates are not terminated because of provisions in a will directing disposition of the trust fund on the death of the beneficiary. Section 5405, Revised Codes, provides; "A trust is extinguished by the entire fulfillment of its object or by such object becoming impossible or unlawful." There being no active provision in the will by which the trust was to be terminated and the third clause relating only to the devolution of the estate in case of Helen surviving Lavin, it follows that section 5405 must control. The object of the trust which was to provide an annuity has not been entirely fulfilled, since both Lavin and the fund exist; nor has such object become impossible or unlawful.

It is clear that the testator intended that his sister Helen or her successor should hold this fund as long as Lavin lived, or as long as the fund existed. There is not a hint or ex-

pression of any kind in the will to indicate any intent on the part of the testator to make the survival of the trust contingent upon the survival of Helen. "When the will does not fix any particular time for the termination of the trust, it will continue so long as may be necessary to accomplish the purpose for which it was created, and it will terminate when those purposes are accomplished." (40 Cyc. 1807.) "The duration and termination of a testamentary trust depend primarily upon the provisions of the will and the question is one of construction of the particular will under consideration." (40 Cyc. 1809.) It is well settled as a general rule that a testamentary trust will not fail because of failure to name a trustee, or because of refusal, death or incapacity of the trustee named; but in such case the court will appoint a trustee. (40 Cyc. 1820.)

Samuel Philbrick's will was a gift of the income of property to be terminated only upon the death of Lavin with remainder to Helen. The death of Lavin was the distinct and only time limit to the gift, subject only to the contingency of the exhaustion of the estate. It seems well settled that a gift of income followed by the gift of the *corpus* on the happening of a contingency or on the death of the beneficiary, by necessary construction, without express words, is a gift of the income for the intermediate period only. (*Matter of Smith*, 131 N. Y. 239, 27 Am. St. Rep. 586, 30 N. E. 130.)

On the death of Samuel Philbrick, the interest of Helen was a future interest in the remainder. This interest was vested because at the time of Samuel Philbrick's death, Helen was living and would have been entitled to immediate possession of the property on the death of Lavin. (Rev. Codes, secs. 4448, 4453.) A vested remainder is a present interest in the property, which the remainderman may convey by deed. (16 Cyc. 652.) Likewise he may mortgage it or bequeath or devise it by will. (*Watson v. Cressey*, 79 Me. 381, 10 Atl. 59.) The interest of Helen on the death of Samuel Philbrick

was therefore a vested remainder, and as such passed to her heirs and devisees.

In *Redman v. Hubbard*, 140 Ky. 71, 37 L. R. A. (n. s.) 728, 130 S. W. 955, it was held that under a will directing that an estate be held for the use of testator's son and family for life and that after his death the propetry should pass to his parent, the descendant of any child to take the share which its parent would have taken if alive at the time, the interest of the child is vested and the father will inherit from the child which dies in his lifetime without issue. We also call the court's attention to the large collection of cases in a note to the *Redman Case* and particularly to the cases of *Hudgens v. Wilkins*, *Cartensen's Estate*, *Flanagan v. Staples*, and *Wright v. Dugan*. It is therefore respectfully suggested that the plaintiff's complaint was properly dismissed.

Messrs. Galen & Mettler, for Relatrix, in Cause No. 4,664, submitted a brief; *Mr. Albert J. Galen* argued the cause orally.

Mr. I. W. Church and *Mr. Fletcher Maddox*, for Respondents, submitted a brief; *Mr. Maddox* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The will of Samuel C. Philbrick, deceased, was admitted to probate by the district court of Cascade county. After directing the payment of the expenses of the testator's last sickness, burial, etc., the will provided:

"Second. I give and bequeath to my sister Helen M. Philbrick of Detroit, Michigan, all of my real and personal estate to be held by her as trustee for my sister Lavin C. Philbrick of Waterville, Le Seuer county, Minnesota, and it is my wish and will that my sister Helen M. Philbrick hold all the said property as such trustee, for the benefit of my sister Lavin C. Philbrick, and I further authorize my said trustee to invest such property as she may see fit, and it is my wish and will

that she, as such trustee, pay to my sister Lavin C. Philbrick the sum of one thousand (\$1,000) dollars each year, providing that if the income from my estate exceeds the sum of one thousand (\$1,000) dollars, then it is my wish and will that my trustee above mentioned, pay to my said sister Lavin C. Philbrick the whole of such income, it being understood that if the income does not reach the sum of one thousand (\$1,000) dollars, she shall have the sum of one thousand (\$1,000) dollars each year, even if resort has to be made to the principal.

“Third. It is my further will and wish that in the event my sister Lavin C. Philbrick should die before my sister Helen M. Philbrick, that the whole of my estate go to and descend to my said sister, Helen M. Philbrick.

“Lastly. I hereby nominate and appoint my said sister Helen M. Philbrick of Detroit, Michigan, the executrix of this, my last will and testament and hereby revoke all former wills by me made, and it is my wish that she administer without bond.”

Such proceedings were had thereafter that the assets of the estate were distributed to Helen M. Philbrick as trustee. After brief service in that capacity, she resigned and the district court appointed S. E. Atkinson in her stead. Some time prior to June 20, 1918, Atkinson died, and on that day the court appointed the American Bank & Trust Company of Great Falls, a Montana corporation, to fill the vacancy. The trust estate then consisted of money and securities aggregating approximately a value of \$14,000, besides a house and lot in the city of Great Falls. On June 22, 1918, Helen M. Philbrick died and left Lavin C. Philbrick her only heir at law.

On December 3, 1918, Lavin C. Philbrick commenced an action in equity against the trustee to obtain a decree declaring the trust terminated by the death of Helen M. Philbrick and directing the trustee to deliver the trust funds and property to her. To this action seven persons, other than the trustee, were also made defendants. It was alleged that they are cousins of plaintiff; that they are the sole surviving rela-

tives of the deceased, other than the plaintiff; that they claim an interest in the trust fund and property as heirs of the deceased, but that their claim is without right. The trustee appeared in the action by interposing a general demurrer to the complaint. The other defendants failed to appear, and default was entered against them. Thereafter, on August 1, 1919, counsel for the trustee by stipulation with counsel for the plaintiff withdrew the demurrer and permitted the default of this defendant to be entered. Counsel then applied to the court for the relief demanded in the complaint. After consideration, the court held that the facts stated were not sufficient to justify any relief, and, plaintiff declining to amend, rendered judgment dismissing the action. From this judgment, plaintiff appealed to this court.

In the meantime, pending the appeal, the plaintiff, concluding that she had mistaken her remedy in bringing the action, filed a petition in the district court in the probate proceeding, entitled "In the Matter of the Estate of Samuel C. Philbrick, Deceased," seeking the desired relief under the provisions of section 7698 of the Revised Codes. The trustee, being ordered by citation to submit his final account and to show cause why the plaintiff should not have the relief demanded, answered the petition, alleging that the facts stated therein presented the same question as that presented in the action which was pending on appeal, and asked that it be dismissed. The court sustained this contention and dismissed the petition. Thereupon the plaintiff, as relatrix, instituted an original proceeding in this court, asking it for an order, under its supervisory jurisdiction, annulling the order of the district court dismissing the petition, and commanding that court to grant the relief demanded.

As reason why this court should assume original jurisdiction it is alleged in the petition that relatrix is advanced in years, and is dependent for food, clothing and shelter upon the property devised to her under the will of her brother; that by reason of the constantly increasing cost of living, and the

decrease of income yielded by the trust estate, it has become impossible for her to support, clothe and shelter herself upon the income; and that it has become necessary for this reason that she have the whole of the estate delivered to her free from the trust, in order that she may make use of it to meet her necessities.

In response to an order issued by this court requiring the respondent court and its judge to show cause why the relatrix should not be granted relief, counsel appearing in their behalf filed a motion to quash the order to show cause and dismiss the proceeding, on the ground that the facts stated in the petition are not sufficient to warrant relief. The proceeding was set for final hearing on September 17 upon the question raised by the motion. The appeal in the equity case was set for hearing on the following day. At the hearing of the former, it being agreeable to counsel, the two causes were consolidated, heard and submitted together. In addition to argument on the merits, counsel presented these questions of procedure: Whether, in view of the provisions of section 7698, the district court had jurisdiction to entertain an independent action to terminate the trust; whether an appeal lies from the order dismissing the petition in the probate proceeding; and whether this court for this reason should not have refused to entertain the original proceeding.

Section 7698 of the Revised Codes, in our opinion, confers [1] jurisdiction upon the district court, when sitting as a probate court, to determine whether the purpose of a testamentary trust has been accomplished, wherever it has acquired jurisdiction over the administration of the estate by probate of the will, which has created a trust to continue after final distribution. It declares that "Where any trust has been created by or under any will to continue after distribution, the district court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." It declares further that any such trustee may, from time to time

during the continuance of the trust, or at the termination thereof, "render and pray for the settlement of his accounts as such trustee before the district court in which the will was probated and in the manner provided for the settlement of the accounts of executors and administrators." It also declares that "any such trustee may, in the discretion of the court or judge, upon application of any beneficiary of the trust, be ordered to appear and render his account after being cited by service of citation as provided for the service of summons in civil cases."

The jurisdiction of the district court, when exercising its [2] probate powers, is special and limited, depending upon the provisions of the Code. By implication it also possesses all the powers incidentally necessary to an effective exercise of the powers expressly conferred. (*In re Davis Estate*, 27 Mont. 490, 71 Pac. 757; *In re Dolenty Estate*, 53 Mont. 33, 161 Pac. 524.) Since the statute expressly declares that the court retains jurisdiction, after distribution, to examine and settle the accounts of the trustee, not only during the continuance of the trust, but also at its termination, and that the trustee may be compelled by it to make an accounting upon the application of any beneficiary under the trust, it seems to us that by necessary implication it confers the power, also, to ascertain when the purpose of the trust has been accomplished, and thereupon to declare it terminated, and to direct the trust fund and property to be delivered to the person or persons entitled to them. Otherwise, in every case, though the trustee has rendered his final account, and it has been found correct and the purpose of the trust has been accomplished, an action would be necessary to terminate the trust and discharge the trustee.

The statute of California (Code Civ. Proc., sec. 1699), except in the mode of procedure prescribed by it, contains substantially the same provisions as ours, *supra*. In the case of *McAdoo v. Sayre*, 145 Cal. 344, 78 Pac. 874, the supreme court of that state, after a full and careful consideration of

it, held that, whenever the power of the superior court having jurisdiction over a trust created by a will is invoked in a proceeding under the statute it has the general power, and it is its duty, if the purpose of the trust has been accomplished, to declare it terminated and to dispose of the entire matter by directing the trust property and assets to be delivered to the person or persons entitled to them. We agree with the conclusion of the California court as to the scope of the provision and accept it as the only logical one. It follows logically from this conclusion that the special jurisdiction conferred by the statute is exclusive.

It is the general rule that the equity power of the court [3, 4] may not be invoked by a litigant to obtain any relief, when a plain, adequate and speedy remedy is afforded in the ordinary course of law. Inadequacy or deficiency of the legal remedy is the fundamental concept of equity jurisdiction. (*Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46; *Raymond v. Blancgrass*, 36 Mont. 449, 15 L. R. A. (n. s.) 976, 93 Pac. 648.) The remedy conferred by the statute is plain, adequate and speedy. It is plain because the statute declares that the court retains jurisdiction over the trust during its continuance. It is adequate because the court may, in the probate proceeding, which is still pending for the purpose of administering the trust, call to its aid all the facilities which are available on the trial of an ordinary action in equity. The same judge who presides in ordinary actions exercises the powers conferred by the statute. The remedy is more expeditious than can be afforded in such an action, because the procedure is simple and summary in character, and is not subject to the delays that are ordinarily incident to the commencement and conduct of formal actions.

The particular reason for which the court sustained the demurrer is not apparent. The result arrived at, however, was correct, and the judgment before us on appeal must be affirmed.

We shall not stop to determine whether the relatrix could have appealed to this court from the order dismissing her petition in the probate proceeding. It is not clear that the statute (Rev. Codes, sec. 7098) authorizes an appeal from such an order.

The fact that an appeal lies from an order is ordinarily [5] a conclusive reason why this court will not exercise its extraordinary supervisory power to review it. This is not always so, however. If the facts make out an exigent case, and it is apparent that the appeal will not afford adequate relief, this is sufficient to warrant action by this court notwithstanding the appeal. (*State ex rel. Whiteside v. District Court*, 24 Mont. 539, 63 Pac. 395; *In re Weston*, 28 Mont. 207, 72 Pac. 512.) When the application for the writ was made, this court was of the opinion that the facts disclosing the condition and necessities of the petitioner made out a sufficient exigency to justify an inquiry whether she should have speedy relief. The district court dismissed the petition for the reason that the action seeking the same relief was still pending. Inasmuch as we have assumed jurisdiction by the original proceeding, we have concluded to take up the case as made by the petition and determine it on the merits, without regard to the reason upon which the lower court based its order dismissing it. In doing so, however, we do not wish to be understood as relaxing in any degree the restrictions heretofore observed in granting relief under our summary supervisory jurisdiction.

The contention of counsel for the relatrix is that by the terms of the will Helen M. Philbrick was to receive no part [6] of the estate except upon the contingency that she survived her sister; that, not having survived and the testator having fixed no term in the will during which the trust must continue, the death of Helen *ipso facto* extinguished the trust; and that under the doctrine of merger the plaintiff became vested with the entire estate and is entitled to have it distributed to her, free from the restrictions of the trust. In

other words, the intention of the testator was, first, to provide for the support of relatrix during her life; and, second, to preserve whatever should remain of the estate at her death for the benefit of Helen, and, the beneficial interest of Helen having lapsed by her death, the whole purpose of the trust has been accomplished.

The rules applicable to the construction of wills laid down in our Code, so far as they are pertinent here, are the following: "A will is to be construed according to the intention of the testator." (Rev. Codes, sec. 4763.) "In cases of uncertainty arising upon the face of the will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." (*Id.*, sec. 4764.) "All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole. * * * " (Sec. 4767.) We find no uncertainty upon the face of the will as to the intention of the testator. If there were, we are not aided by knowledge of the circumstances under which the testator executed it, for none of these circumstances appear from the petition, other than that the testator had only two sisters, and that he wished to dispose of his estate for the benefit of one of them to the exclusion of the other, except upon the contingency that the latter should survive the former. It is obvious from clause 2 that the intention of the testator was to set apart his whole estate to provide an annual income of not less than \$1,000 for relatrix during her life through the instrumentality of a trusteeship, and for this purpose to authorize the trustee, whenever the necessity might arise, to resort to the *corpus* of the trust property, even if the final result would be the exhaustion of the entire estate. This was clearly the controlling idea in the mind of the testator. Why a provision for a trustee should have been made at all is not apparent. So far as we can judge, the intention may have been prompted by the feeble condition of the health of

the relatrix, or by her lack of business capacity, or her spendthrift habits. This, however, is merely speculation. No fact or circumstance appears from the petition justifying any conclusion as to what may have been the testator's motive. Whatever his motive may have been, there can be no doubt of his main purpose. That he selected his sister Helen to act as trustee argues nothing other than that she was his nearest other relative, and was regarded by him competent to carry out his wish. The bequest of the remainder of the estate to the trustee upon the contingency that she should survive her sister is not in any way inconsistent with the main purpose, but merely indicates the wish of the testator that such part of the estate, if any, should remain after the main purpose had been accomplished, should go to his only other surviving relative. The trustee was given an unlimited discretion in making investments, but this did not vest in her an absolute discretion with regard to the execution of the main purpose of the trust. Nor does it indicate that the trust should terminate in case she should die before her sister. Let it be assumed that she had died before the testator or before she had qualified after his death. In that case, if the contention of relatrix is maintainable, the obvious intention of the testator would have been defeated. In our opinion, it appears from the terms used by the testator that he intended the trust to continue during the life of the beneficiary, or until the final exhaustion of the estate, by providing her the annual income. There is therefore no merit in the contention of counsel.

The judgment appealed from in the equity case is affirmed. The motion to quash the order to show cause in the original proceeding is sustained, and the petition is dismissed.

ASSOCIATE JUSTICES HURLY and COOPER concur.

**BUTTE MINERS' UNION, APPELLANT, v. CITY OF BUTTE,
RESPONDENT.**

(No. 4,424.)

(Submitted September 14, 1920. Decided October 18, 1920.)

[194 Pac. 149.]

***Cities and Towns—Riots—Liability for Damages—Purpose of
Statute—Right to Bear Arms—Constitution—Instructions.*****Government—Primary Purpose.**

1. The primary purpose of government is maintenance of peace and social order.

Cities and Towns—Riots—Statutory Liability—Purpose of Statute.

2. The purpose of section 3485, Revised Codes, making cities and towns responsible for injuries to real or personal property within their corporate limits, caused by mobs or riots, is not only to create municipal liability, but to instill in the minds of taxpayers a will to discourage violence and to stimulate effort to preserve public safety.

Same—Riots—Damages—Absolute Liability—Exception.

3. *Held*, under section 3485, Revised Codes, that the liability of a city for damages to property through riots or mobs is absolute, save where the plaintiff owner by his own unlawful conduct induced the injury for which he seeks damages, in which event he cannot recover, since no one can take advantage of his own wrong.

[What constitutes mob or riot for which municipality is liable, see notes in 11 Ann. Cas. 185; 18 Ann. Cas. 151.

[Liability of municipality for damage caused by mob as dependent on notice to authorities, see notes in 8 Ann. Cas. 465; Ann. Cas. 1916A, 326.]

Same—Riots—Storing Arms in Building Destroyed—Defenses.

4. The bare fact that plaintiff labor union had stored arms and ammunition in its building to protect its property and the lives of its members there assembled was not alone sufficient to defeat its right to recover damages under section 3485, Revised Codes, since under the provisions of the state Constitution, the right to protect property and to bear arms in defense of person and property is guaranteed (Art. III, secs. 3, 13).

Same—Riots—Instructions.

5. In an action against a city for damages to its property during a riot, in which the defenses alleged were that, though knowing of the danger incident to holding a parade on a certain day, it nevertheless did hold it and failed to advise defendant of its fears in that regard, and that plaintiff had caused firearms and ammunition to be stored in its building and that but for the fact that a shot was fired therefrom, which enraged the mob, the injury complained of would not have resulted, an instruction that if plaintiff by "want of ordinary care" or by its own "voluntary acts" contributed to the injury, it could not recover, *held* erroneous as inapplicable under the issues, and because faulty for failure to define the terms "want of ordinary care" and "voluntary acts."

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

ACTION by the Butte Miners' Union against the City of Butte. From a judgment for defendant and from an order denying it a new trial, plaintiff appeals. Reversed and remanded.

Mr. Peter Breen, Mr. T. F. Shea and Mr. A. C. McDaniel, for appellant, submitted a brief; *Mr. Breen* argued the cause orally.

The states of New York and Pennsylvania have sections founded on the same principle as our section 3485. The court of appeals of New York in the case of *Darlington v. Mayor etc. of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248, has given a very concise statement of the reasons for the enactment of such a statute. It shows the necessity of the state making cities and towns liable for injuries caused by mobs. (*County of Allegheny v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670.)

The state of Kansas has a similar law, which reads: "All incorporated cities and towns shall be liable for all damages that may accrue in consequence of the acts of mobs within their corporate limits, whether such damages shall be loss of property or injury to life or limb."

In the case of the *City of Iola v. Birnbaum*, 71 Kan. 600, 6 Ann. Cas. 267, 81 Pac. 198, the city argued that it had no notice of the existence of the mob and no opportunity to control it. Under the statute quoted, the court held that no notice was required and that the defense was not available to the city. (See, also, *Blakeman v. City of Wichita*, 93 Kan. 444, Ann. Cas. 1916D, 188, L. R. A. 1915C, 578, 144 Pac. 816; *City of Cherryvale v. Hawman*, 80 Kan. 170, 133 Am. St. Rep. 195, 18 Ann. Cas. 149, 23 L. R. A. (n. s.) 645, 101 Pac. 994; *City of Madisonville v. Bishop*, 113 Ky. 106, 57 L. R. A. 130, 67 S. W. 269; *Williams v. City of New Orleans*, 23 La. Ann. 507;

Wolfe v. Richmond, 11 Abb. Pr. (N. Y.) 270, 19 How. Pr. 370; *Mayor etc. of Hagerstown v. Dechert*, 32 Md. 369; *Fauvia v. City of New Orleans*, 20 La. Ann. 410; *Solomon v. City of Kingston*, 24 Hun (N. Y.), 562; *Luke v. City of Brooklyn*, 43 Barb. (N. Y.) 54; *Sarles v. Mayor etc. of City of New York*, 47 Barb. (N. Y.) 447; *Moody v. Board of Supervisors of Niagara County*, 46 Barb. (N. Y.) 659.)

In nearly all of the states which have statutes on the subject there appear in the statute conditions which will excuse the city from liability if the conditions are not met. These conditions are such as notice to the city of the formation of the mob, or that a person's property is liable to be destroyed or injured by a mob, or that if the plaintiff is careless or negligent or does some wrongful act. None of these conditions appear in the Montana statute, which is final and absolute. It makes no difference for what reason the mob formed, or how it was formed, or whether the plaintiff had anything to do with the formation, or did any act which caused the formation of the mob, or did anything to excite or inflame the mob. No such conditions appear in the Montana statute and none can be grafted thereon by any construction. The defenses which the said city sought to impose in this action in its affirmative defense to the first cause of action, and in its defense to the second cause of action, and by its evidence introduced at the trial, are wholly irrelevant and foreign to the issues in the case. The statute has made no allowance for such defenses or such evidence. It contains no matter of mitigation of damages or of an excuse for not controlling and preventing the acts of the mob. And in all of the states which have statutes with such modifications and conditions, it has been held that the city is liable unless such conditions are proven. The state of Illinois has such a statute. In the *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 69 Am. St. Rep. 321, 45 L. R. A. 848, 53 N. E. 68, the court held that the statute making the city or county liable for property destroyed within it by a mob, without reference to its ability to

exercise of diligence to prevent the destruction, is within the police power of the state, and a person who brings himself within the statute is entitled to damages for the destruction of his property. (*Sturges v. City of Chicago*, 237 Ill. 46, 86 N. E. 683; *Champaign County v. Church*, 62 Ohio St. 318, 78 Am. St. Rep. 718, 48 L. R. A. 738, 57 N. E. 50.)

Assuming that shots were fired from the hall and by members of the plaintiff at the crowd outside on June 23, this fact would be no defense for the city, for not protecting the property of the plaintiff and not controlling the mob. Even if it did, it had that right, as stated by Chief Justice Gibson in the case of *Donoghue v. County*, 2 Pa. St. 230, to do so: "It was justifiable to introduce men and arms into the house as the exercise of a freeman's privilege, whether there was an apprehension of danger or not."

It is generally held that to constitute a riot, there must be present an element of concerted action and violence in attacking those who offer resistance to the execution of an unlawful plan or of a large tumultuous gathering against the public peace and order, which carries out this unlawful destruction of property with preparation and deliberation or of unlawful conduct which inspires terror. We submit all of the elements of the mob or riot were present here which are shown in these cases: *City of Cherryvale v. Hawman*, 80 Kan. 170, 133 Am. St. Rep. 195, 18 Ann. Cas. 149, 23 L. R. A. (n. s.) 645, 101 Pac. 994; *Champaign County v. Church*, 62 Ohio St. 318, 78 Am. St. Rep. 718, 48 L. R. A. 738, 57 N. E. 50; *Harvey v. City of Bonner Springs*, 102 Kan. 9, L. R. A. 1918C, 231, 169 Pac. 563.

It is no defense to an action brought under a statute making the city liable for the acts of the mob to show that the city was unable to prevent the injury. It was said in the case of *Allegheny County v. Gibson*, *supra*, that the courts will not allow a great city to stand idly by while a mob destroys property. Under the statute, section 8959, Revised Codes, the city and its officers has the power to summon to their aid all

of the people in the city or county to prevent the destruction by the mob; they have the right to command assistance; they do not have to ask for it, and this is the holding in the following cases: *City of Iola v. Birnbaum*, 71 Kan. 600, 6 Ann. Cas. 267, 81 Pac. 198; *Blakeman v. City of Wichita*, 93 Kan. 444, Ann. Cas. 1916D, 188, L. R. A. 1915C, 578, 144 Pac. 816; *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509; 19 R. C. L., p. 1103, sec. 388.

The city claims that the mob of June 23, 1914, was lawfully assembled, and that it afterward, because of acts of the plaintiff, became riotous, and that the city should not be held liable for any of the acts of the mob because of the alleged acts of the plaintiff. It is no defense that a number of persons lawfully assembled, and that afterward they formed an unlawful purpose and carried it into execution. (*Harvey v. City of Bonner Springs*, 102 Kan. 9, L. R. A. 1918C, 231, 169 Pac. 563; *Blakeman v. City of Wichita*, 93 Kan. 444, Ann. Cas. 1916D, 188, L. R. A. 1915C, 578, 144 Pac. 816; *City of Madisonville v. Bishop*, 113 Ky. 106, 57 L. R. A. 130, 67 S. W. 269.)

Mr. S. P. Wilson, Mr. R. L. Clinton and Mr. E. D. Elderkin, for Respondent, submitted a brief; *Mr. Wilson and Mr. Clinton* argued the cause orally.

Appellant contends in its brief that the liability imposed by statute is an absolute one, and that upon proof of the existence of the mob and riot, and the injury to its property, appellant was entitled to recover without regard to its own participation in the cause of the injury. The proposition advanced by appellant is startling in the extreme, and it is not surprising that no authority is cited in the brief or referred to in the books sustaining its position in this record.

The universal holding of the courts since we have history of recorded decisions is contrary to the position taken by appellant in this case. It is true that under the statutes enacted in some of the states there is express provision that the in-

jured party cannot recover if the injury was caused by any wrongful or unlawful act on his part. Our own statute does not contain any such express provision, but the rules of law are so firmly settled that no person can recover for damages arising out of or proximately caused by his own voluntary act, that it applies in a case such as this just as forcefully as if written in express words into the statute. (1 Thompson's Commentaries on Negligence, sec. 185; *Smith v. Centennial Eureka Min. Co.*, 27 Utah, 307, 75 Pac. 749; *Broschart v. Tuttle*, 59 Conn. 1, 11 L. R. A. 33, 21 Atl. 925; *Young v. Chicago, M. & St. P. Ry. Co.*, 100 Iowa, 357, 69 N. W. 682; *Chase v. New York Cent. etc. R. Co.*, 208 Mass. 137, 94 N. E. 377; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. Ed. 997, 6 Sup. Ct. Rep. 877 [see, also, Rose's U. S. Notes]; *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, 5 L. R. A. 340, 22 N. E. 188; *Sweeney v. Montana Cent. Ry. Co.*, 25 Mont. 543, 65 Pac. 912; 29 Cyc. 666.) The rule was specifically applied in the following cases, where liability was sought to be imposed because of the actions of the mob: *Eastman v. Mayor etc. of City of New York*, 5 Rob. (N. Y.) 389; *Ely v. Board of Supervisors of Niagara County*, 36 N. Y. 297; *Chadbourne v. Town of New Castle*, 48 N. H. 196; *Palmer v. City of Concord*, 48 N. H. 211, 97 Am. Dec. 605; *Underhill v. City of Manchester*, 45 N. H. 214; 6 McQuillin on Municipal Corporations, sec. 2650; *Wing Chung v. City of Los Angeles*, 47 Cal. 531; *Paladino v. Board of Supervisors of Westchester County*, 47 Hun (N. Y.), 337.

The decisions concerning the liability of corporations for acts of those acting in its behalf are innumerable. We refer to a few of the leading decisions which, because of the similarity of facts, are particularly instructive in this connection: *Denver & R. G. Ry. Co. v. Harris*, 3 N. M. 109, 2 Pac. 369, affirmed by the supreme court of the United States in 122 U. S. 597, 30 L. Ed. 1146, 7 Sup. Ct. Rep. 1286 [see, also, Rose's U. S. Notes]; *Meek v. Smith*, 59 Colo. 461, 149 Pac. 627; *Berry Foundry Co. v. International Moulders Union*, 177 Mo.

App. 84, 164 S. W. 245; *Anthony v. American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23; *Franklin Union, No. 4, v. People*, 220 Ill. 355, 110 Am. St. Rep. 248, 4 L. R. A. (n. s.) 1001, 77 N. E. 176; *Bingham v. Lipman*, 40 Or. 363, 67 Pac. 98; *Grorud v. Lossel*, 48 Mont. 274, 280, 136 Pac. 1069; *Johnston Fife Hat Co. v. National Bank of Guthrie*, 4 Okl. 17, 44 Pac. 192; *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 70 Am. St. Rep. 280, 44 L. R. A. 159, 52 N. E. 445; 5 Fletcher's Cyclopedia of Corporations, secs. 3338-3340.

MR. JUSTICE COOPER delivered the opinion of the court.

This action was commenced in Silver Bow county to recover damages sustained for injuries to property on two different occasions at the hands of mobs assembled in the city of Butte. It is not disputed that the ownership of the building known as Miners' Union Hall, and the personal property contained therein at the time of the injuries, was in the plaintiff corporation; nor that the removal and destruction of it were accomplished by mobs within the city limits.

The complaint consists of two causes of action. The first alleges, in substance, the assembling of a mob on June 13, 1914, the attack upon plaintiff's property with clubs, bricks and bottles; the beating up of persons upon the streets, and the carrying away and destruction of personal property of the value of \$30,000. In the second cause of action it is alleged that on June 23, 1914, plaintiff's building, known as Miners' Union Hall, was attacked by a mob, torn down and destroyed, to its damage in the sum of \$63,000. The answer denies all the allegations of both causes of action, and as against the first cause of action it is affirmatively alleged that the plaintiff was advised upon several occasions prior to, and particularly on, June 13, 1914, that if it should attempt to conduct a parade upon that day, such attempt would cause a riot and injury and destruction of its property would follow as a result thereof; that defendant did not know, nor by the

exercise of reasonable diligence could have ascertained, that a mob would gather; that the plaintiff knew of the danger attending the holding of a parade and that it would cause injury to its property, but failed and neglected to advise defendant of its fears in that regard. Against the second cause of action it is alleged that plaintiff through its officers caused firearms, guns and ammunition to be stored in its building; that during a meeting attended by more than a quorum of its members, when one of its members attempted to enter its building for the purpose of participating in the proceedings, men stationed in the building shot and injured such member and also shot into the crowd in front of the building on Main Street, wounding two persons and killing another, thereby causing the crowd to become enraged and to attack and partially destroy the building; that until the shooting commenced no damage had been done, and but for the shooting plaintiff's property would not have been damaged. By replication all of the affirmative allegations of the answer were denied.

The cause was transferred to Powell county, where it was tried to a jury, and a verdict and judgment were rendered and entered in behalf of defendant. A motion for a new trial was made and overruled and appeal taken to this court from the judgment and order so made.

Appellant's position is that its right to recover is not to be denied it merely because it did not notify defendant that it would hold a parade and that damage would result therefrom, but that plaintiff had a right to parade the public streets of the city, to meet in lawful assembly, and to repel attack by such force as might be necessary to preserve the lives of its members and to prevent the destruction of its property.

Respondent's answer to this is that by reason of the holding of the parade, the plaintiff's failure to notify the city of its intention to parade, the storage of guns, ammunition and explosives in the building, and the shooting therefrom into the assemblage of persons on Main Street in front of the build-

ing, the riot occurred and plaintiff's property was removed and damaged.

Thirty-six errors are pressed upon our attention by appellant, but we shall notice only those affecting the turning points in the case, and those questions likely to arise upon another trial.

Primarily, government exists for the maintenance of peace [1,2] and social order. The purpose of our statute, and those of similar import, is to create municipal liability and tend to instill in the minds of every person liable to contribute to the public expense, a will to discourage violence and to stimulate effort to preserve public safety. This view is upheld by the supreme court of the United States in the case of *City of Chicago v. Sturges*, 222 U. S. 313, 323, Ann. Cas. 1913B, 1349, 56 L. Ed. 215, 32 Sup. Ct. Rep. 92 [see, also, Rose's U. S. Notes], where the history and purpose of this character of legislation are reviewed, as follows: "The state is the creator of subordinate municipal governments. It vests in them the police power essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus intrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults. The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of the Anglo-Saxon people. Thus, 'The Hundred,' a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. I, C. I, coming on down to the 27th Elizabeth, C. 13, the Riot Act of George I (1 Geo. I, St. 2), and Act of 8 George II, C. 16, we may find a con-

tinuous recognition of the principle that a civil subdivision intrusted with the duty of protecting property in its midst and with police power to discharge the function may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the states and held valid exertions of the police power. (*Darlington v. Mayor etc. of City of New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Fauvia v. City of New Orleans*, 20 La. Ann. 410; *County of Allegheny v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670.) The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil-doers of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law."

We are not at liberty to read into a statute like section [3] 3485 of the Revised Codes, language qualifying the right of recovery, but are bound, rather, to assume that had the legislature intended to prescribe the conditions under which it should come into force, it would have particularized in plain and unmistakable words the things intended to prevent recovery under it. Its language is: "Every city or town is responsible for injuries to real or personal property within its corporate limits, done and caused by mobs or riots." Having thus spoken upon the subject, for constitutional reasons familiar to all, it is beyond the scope of judicial power to write exceptions into a law the legislature has not seen fit to place there. (*County of Allegheny v. Gibson*, *supra*; *Williams v.*

City of New Orleans, 23 La. Ann. 507.) While the statute upon its face is absolute, it may well be that cases might arise in which the courts would be impelled to deny a suitor its benefits. For instance: It is one of the legal maxims of the jurisprudence of this state that no one can take advantage of his own wrong (Rev. Codes, sec. 6185). In the present [4] case, however, nothing short of the commission of an overt act by some agency authorized or abetted by the plaintiff itself to which the damage can be clearly attributed would relieve the city of responsibility under the statute, for along with the right the statute accords are the guaranties of the Constitution that the right of enjoying and defending life, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness in all lawful ways (Const. of Montana, Art. III, sec. 3), and the right to bear arms in defense of home, person and property shall not be called in question (*Id.*, Art. III, sec. 13). In the light of this reasoning, it was the duty of the district court to inform the jury that if the evidence disclosed that, annually, on June 13 (known as Miners' Union Day), it had been the custom of the plaintiff to hold a parade in the public streets of the city of Butte, that of itself would constitute sufficient notice to the city; and that plaintiff's right to recover for the destruction of its property could not in any event be affected by its failure to advise the city of its intention to parade, as it was wont to do. It was likewise its duty to state fully to the jury the principle of the statutes applicable to the evidence, and to instruct them that the city would be liable for the damage done to plaintiff's property through mobs or riots, unless, from a preponderance of all the evidence in the case, it appeared that the plaintiff, by its own wrongful conduct, induced the injury for which damages were sought.

At the close of all the testimony, and without objection on the part of plaintiff, the court instructed the jury, in effect, that the defendant city was liable for injuries to the property of the plaintiff, done or caused by mobs or riots,

regardless of its ability or inability to prevent it; that the plaintiff had a lawful right to hold a peaceable parade in accordance with its custom; that in so doing neither plaintiff nor its members were in any manner violating any law of this state or of the United States, nor doing anything that would justify persons or a mob in destroying the property of plaintiff; that before such a defense could be considered the jury must find that said parade was organized for an unlawful purpose, and that such parade was the proximate cause of the riotous and destructive acts of the mob on the thirteenth day of June; that if the jury found that the members of the plaintiff corporation were peaceably assembled on the evening of June 23, 1914, and were gathered in plaintiff's building in attendance upon a meeting being held therein, and that such members did carry and bear firearms within said building at the time of said meeting, such facts alone would not be a defense in this action, unless they further found that such firearms were present in the building for unlawful purposes.

Objection was made by the plaintiff to the giving of instruction No. 9, in which the jury were told that plaintiff [5] could not recover, "notwithstanding the fact that there had been a neglected duty on the part of the defendant city, or its officers, with reference to the mobs or rioting on the 13th of June, 1914, whereby plaintiff's property was damaged or injured, if the plaintiff, by want of ordinary care, or by its own voluntary acts so far contributed to the injury that, had it not been for its acts and want of ordinary care, the injury would not have happened." The phrase "want of ordinary care" used in the instruction injected into the case an issue which neither the pleadings nor the nature of the action justified. Neither did the court advise the jury what acts or omissions of the plaintiff constituted the "voluntary acts" contributing to the destruction of plaintiff's property. Who can say, therefore, that the verdict of the jury, so far as it responds to the issue raised by the affirmative defense to the first cause of action, does not rest upon the alleged

failure on the part of the plaintiff to give notice to the city authorities that it intended to conduct its usual annual parade, and that it had reason to apprehend that damage might be inflicted upon its property if it carried out its purpose so to do? Or who can say that the jury did not, upon the issue created by the defense interposed to the second cause of action, base its verdict upon the presumption that the plaintiff caused firearms, ammunition and explosives to be stored in and about its meeting place, for purposes other than that of preserving the lives of its members and the protection of its property; or that the jury reached the verdict it did under the impression that the weapons plaintiff had caused to be stored in its building were recklessly, without provocation and unlawfully pointed at and discharged into an orderly assemblage of persons in front of its building, and constituted in the minds of the jury the "voluntary acts" or "want of ordinary care" referred to in the instruction.

Upon the whole record before us, it is apparent that the district court adopted and applied principles of law opposed to those above announced, and submitted the case to the jury upon the erroneous theory that the plaintiff merely by the storage of arms in the building provoked the attack and brought upon itself the injury complained of. For these reasons the judgment and order are reversed and the cause is remanded to the district court for a new trial in conformity with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

Rehearing denied December 13, 1921.

HOPKINS, RESPONDENT, v. PARADISE HEIGHTS FRUIT
GROWERS ASSN., APPELLANT.

(No. 4,185.)

(Submitted September 21, 1920. Decided October 27, 1920.)

[193 Pac. 389.]

Contracts — Corporations — Powers of Officers — Work and Labor—Quantum Meruit—Value of Services—Evidence—Inferences—Common Observation—Trial by Court—Immaterial Evidence—Presumptions.

Corporations—Power of Secretary to Make Contracts—Estoppel.

1. Generally speaking, the secretary of a corporation has no implied authority, as an incident to his office, to contract for his corporation; but where the corporation conducts its affairs in such a way as to induce those who deal with it to act upon the assumption that he has authority to bind it as its general agent, it is precluded, upon the principle of estoppel, to assert that he was without power to do the act for which it is sought to be held liable.

Same—Powers of Agents—How Determinable.

2. Since a corporation can act only through its agents, the circumstances of each case must be looked to to determine whether it shall be held bound by the acts of its officers.

Contracts in Writing—When not Completed.

3. Where it was the understanding of the parties that the terms of a proposed contract were to be reduced to writing and signed by them, and this was not done, it did not become a completed contract, even though the terms thereof as proposed by defendant through letters and telegrams were definitely accepted through the same medium by plaintiff.

Work and Labor—Quantum Meruit—Implied Contracts.

4. Where the president and general manager of a corporation with full knowledge of an agreement between plaintiff and its secretary, which was to be reduced to writing but was never completed, under which plaintiff was to continue in charge of its property and care for it as he had theretofore done under a previous contract which had expired, and personally instructed him to remain in charge and that he would be reimbursed for expenses incurred and compensated for his services, plaintiff was entitled to recover under an implied contract.

Same—Reasonable Value—Evidence—Sufficiency.

5. In an action on an implied contract for services rendered in taking care of orchard property, where it appeared that he had been paid \$125 a month for like services under a previous contract, and that under a contemplated contract which failed of execution he was to receive \$100 for the same services, a finding by the court in a trial without a jury that \$100 per month was their reasonable value was proper, although plaintiff did not state in his testimony what his services were worth and there was no specific evidence on the question of value.

Same—Value of Services—Trial by Court—Evidence—Inferences.

6. In an action of the nature of the above tried without a jury, the trial judge may properly draw upon his own experience and observation in order to determine what plaintiff's services were reasonably worth, in the absence of specific evidence in that respect.

Appeal and Error—Trial by Court—Immaterial Evidence—Presumptions.

7. Where the trial judge in an action tried without a jury stated to counsel that in rendering his decision he would disregard all evidence objected to as immaterial if he found it to be so, it will be presumed on appeal that he did so, and hence that appellant suffered no prejudice.

Appeal from District Court, Ravalli County; Theodore Lentz, Judge.

ACTION by Ellis F. Hopkins against the Paradise Heights Fruit Growers' Association. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Cause submitted on briefs of Counsel.

Messrs. Wagner & Taylor, for Appellant.

Mr. S. J. Bischoff, for Respondent.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by the plaintiff to recover for services alleged to have been rendered by him to the defendant, and for money expended in its behalf in caring for real and personal property belonging to it and under its control.

The complaint contains two counts. The first alleges, in substance, that on or about March 1, 1915, the plaintiff and defendant entered into a contract under the terms of which plaintiff agreed to perform services for defendant for a term of three years at a monthly salary of \$100; that he was authorized to hire necessary labor in addition to his own, and to expend money for the purchase of hay, grain, implements and material when needed; that pursuant to the terms of the contract he performed services during the months of January,

February, March and April, 1915, for which defendant became indebted to him in the sum of \$400, no part of which has been paid, except the sum of \$100, the installment of his salary for the month of January; that he paid out and expended money for labor, and for hay, grain, *etc.*, to the amount of \$524.70, no part of which has been paid; and that he performed all of the conditions of the contract to be performed by him. Judgment is demanded for \$824.70. In the second count, recovery is sought, upon an implied contract, for \$824.70 for services alleged to be of the reasonable value of \$100 per month, and for money paid and expended; the services having been rendered and the money expended at defendant's special instance and request.

The answer is a general denial of all the material allegations in both counts. A trial by the court without a jury resulted in a judgment for plaintiff for \$784.70. Defendant has appealed from the judgment and an order denying it a new trial.

At the trial in the court below the defendant offered no evidence. There were no formal findings. The cause was submitted to this court without oral argument. In the brief of counsel we find thirty-three assignments of error. Two of these challenge the sufficiency of the evidence to justify the decision. The others are predicated upon rulings of the court in admitting evidence introduced by plaintiff.

Upon the question of the sufficiency of the evidence the contentions of counsel are: (1) That it wholly fails to establish the contract alleged in the complaint, and therefore does not warrant a recovery under the first count; and (2) that, since, it is apparent from reading the record that the plaintiff abandoned the second count, in that he failed to introduce any evidence tending to establish the reasonable value of the services rendered but relied upon the contract alleged, the evidence is not sufficient to warrant a recovery under the second count.

The defendant is a corporation organized under the laws of South Dakota, having its principal place of business in the city of St. Paul, Minnesota. It is authorized by its charter to purchase or otherwise acquire and hold lands, with water rights, *etc.*; to plant and cultivate them in fruit orchards, or devote them to ordinary agricultural uses; and to provide itself with equipment and supplies necessary or proper to harvest and market the products. Prior to January 1, 1915, it owned and had under its control lands situated in Ravalli county, Montana. These lands were planted in fruit trees which were not yet mature enough to bear. Plaintiff had been employed by defendant under a contract to cultivate the trees and keep them pruned. He was authorized to expend money for the purpose of employing labor when necessary to assist in the performance of his duties, to purchase implements when needed, to keep them in repair, and to purchase hay, grain, *etc.*, to maintain work animals furnished him by defendant. His contract being about to expire, negotiations were opened by him with the defendant, through Harry A. Hageman, its secretary, with the knowledge and consent of W. H. Klauer, the president and general manager, and Louis Boeglin, the vice-president, to renew the contract of employment for another term. These negotiations were conducted through the medium of letters and telegrams from about the middle of December, 1914, up to March 2, 1915, when a definite agreement was reached that the contract should be renewed for three years from January 1, 1915, under the terms of the old contract, except that plaintiff's salary was to be \$100 instead of \$125 per month as fixed by that contract. The agreement was to be embodied in a formal contract by Hageman and forwarded to plaintiff for his signature. This was not done. In the meantime, from and after January 1, 1915, the plaintiff continued to perform services and to look after the pruning of the trees, *etc.*, as theretofore, sending to Hageman his monthly statements of amounts due him for salary and expenses, as before. About the middle

of the month of March, Klauer and Goeglin visited the plaintiff. After looking over the orchards, Klauer declared himself dissatisfied with the prospect of making them productive, but found no fault with the care of them theretofore and then being given them by plaintiff. Klauer then stated to the plaintiff that he had determined that nothing more should be spent on the cultivation of the orchards because he regarded them a failure. Plaintiff, however, was left in charge until the end of April, when the defendant refused to live up to the agreement. We shall not quote the correspondence between the plaintiff and Hageman because it is somewhat voluminous. It discloses, however, that the terms of the contract as proposed to plaintiff by Hageman were definitely accepted by him by a letter and telegram to Hageman dated March 2, 1915. The letter inclosed a statement of salary and expenses for January and February, with a request for payment. The January installment of salary was paid, but the expenses were not, nor was any other payment thereafter made.

It is insisted by counsel for the defendant that there is no [1] evidence that Hageman had been authorized by the board of directors of the defendant to enter into the contract with the plaintiff, and that, even if he had been so authorized, the negotiations did not result in a completed contract. It is true that there was no evidence that the board of directors had by resolution or otherwise authorized Hageman to negotiate the contract with the plaintiff. Speaking generally, the secretary of a corporation has no implied authority, as an incident to his office, to contract for the corporation. (*Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027.) This is not an invariable rule. The extent of his authority is to be determined by the character of the business of the corporation, and the relative powers and duties of other officers. The conduct of its business through its secretary in such a way as to induce those who deal with it to act upon the assumption that he has authority as its general agent will, by

the principle of estoppel, preclude it from alleging that he was without authority to perform an act for which it would not ordinarily be held liable. A corporation can act only [2] through agents, and the circumstances of each case must be looked to to determine whether the corporation shall be held bound by the acts of this officer. But it is not material here to determine whether Hageman was authorized to contract for the defendant. If it be assumed that he was, under a well-settled principle of the law of contracts, the negotiations [3] did not result in a completed contract. It appears that it was the understanding between the plaintiff and Hageman that the agreement was to be embodied in a formal written contract. This was not done. It is a general rule that, when it is a part of the understanding between the parties that the terms of their agreement are to be reduced to writing and signed by them, their assent to its terms must be evidenced in the manner agreed upon or it does not become a completed contract. (*Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797; *Morrill v. Tehama M. & M. Co.*, 10 Nev. 125; *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800; *Montague v. Weil*, 30 La. Ann. 50; *Mississippi etc. Steamship Co. v. Swift*, 86 Me. 248, 41 Am. St. Rep. 545, 29 Atl. 1063; 9 Cyc. 282.) From this point of view, the evidence is insufficient to warrant a recovery under the first count. It is amply sufficient, however, to warrant recovery under the second count.

Klauer, the president and general manager, knew of the [4] negotiations between the plaintiff and Hageman. He knew that plaintiff was in possession of defendant's property and expending money in caring for it. He visited plaintiff in March and had personal knowledge of the character of his services and the expenses he was incurring. He then went away, leaving plaintiff to infer that he was expected to remain and to do as he had done theretofore, and that he would be reimbursed for the expenses incurred and compensated for his services. If it was the purpose to abandon the enterprise, it was Klauer's duty then and there to inform plaintiff of this fact and not to permit him to continue to care for the

defendant's property at his own expense. Even if he had notified the plaintiff to abandon the property and cease to care for it, there would still have been left to be paid what the defendant owed him up to that time. It would be unconscionable, under the circumstances, to permit the defendant to escape liability.

It is true that plaintiff did not state in his testimony [5, 6] what was the reasonable value of his services. There was no specific evidence on this point. It did appear, however, that plaintiff had theretofore been paid \$125 per month, and that, under the understanding between him and Hageman, he was thereafter to receive \$100 per month and that this amount was reasonable under the circumstances. In addition to these facts, the evidence otherwise discloses fully the character of the services being rendered. This was sufficient to warrant the conclusion that they were reasonably worth what the plaintiff claimed. Even in the absence of any evidence, other than that showing the character of the services, we think the presiding judge was at liberty to draw upon his own experience and observation in order to determine what the plaintiff was entitled to.

We have examined the other assignments of error. Some [7] of the rulings complained of permitted the introduction of immaterial evidence. At the time the rulings were made, however, the judge stated to counsel that if, in making up his decision—which he did after having the case under advisement for several days—he reached the conclusion that any of the evidence had been improperly admitted, he would exclude it from consideration. The presumption must be indulged that he did this, and hence that the defendant suffered no prejudice. (*Montana Ore Pur. Co. v. Butte & Boston C. Min. Co.*, 25 Mont. 427, 65 Pac. 420; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123; *Lagier v. Lagier*, ante, p. 267, 193 Pac. 392.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HURLY and MR. JUSTICE COOPER concur.

JOHNSON, APPELLANT, v. NORTHERN PACIFIC RY. CO.,
RESPONDENT.

(No. 4,203.)

(Submitted September 24, 1920. Decided October 27, 1920.)

[193 Pac. 57.]

False Imprisonment—Malicious Prosecution—New Trial—Discretion—Conflict in Evidence—Appeal and Error.

New Trial—When Proper.

1. Where, in the opinion of the trial court, the evidence preponderates against the finding of the jury, it should be set aside and a new trial granted.

Same—Evidence Preponderating Against Verdict—Discretion.

2. Where, in an action for false imprisonment and malicious prosecution, an order granting a new trial, general in terms, was justifiable on the theory that the evidence, conflicting in character, preponderated against the finding of the jury in favor of plaintiff, the supreme court will not say on appeal that the trial court abused its discretion in granting the motion.

Appeal from District Court, Missoula County; Theodore Lentz, Judge.

ACTION by Paul Johnson against the Northern Pacific Railway Company. Verdict for plaintiff, and, from order granting defendant a new trial, plaintiff appeals. Affirmed.

Messrs. Patterson, Heyfron & Simes, for Appellant, submitted a brief; *Mr. Lewis M. Simes* argued the cause orally.

Messrs. Gunn, Rasch & Hall and *Mr. Wm. F. Wayne*, for Respondent, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

Action for damages for false imprisonment and malicious prosecution. The jury returned a general verdict for plaintiff. From an order granting a new trial, plaintiff appeals.

It appears that on the 28th of February, 1915, plaintiff was a passenger, riding in the smoking-car of one of defendant's passenger trains, between Plains and Missoula, Montana, of which one Door was the conductor. Another passenger named Laundry occupied, with plaintiff and others, seats together for a portion of the distance. Laundry was intoxicated, apparently to a considerable extent, and had some controversy with the conductor concerning his ticket, in which threats of fight were made by Laundry, concerning which the conductor testified that Johnson, plaintiff, stated at the time that if Laundry needed any assistance, he would help him as against the conductor. There is testimony also that the parties had a bottle of whisky, which was passed among them from time to time, that Johnson was intoxicated when he got on the train, and that he was even more so when he got off at Missoula. During the trip he vomited, and the person who cleaned the car testified that this bore the odor of whisky.

Laundry was noisy and abusive upon the train, and caused considerable disturbance from the time he got on. Door testified that he warned them that it was in violation of law for them to drink intoxicating liquors on the train. He himself did not see the bottle, nor any drinking. This testimony was given by other members of the train crew and by passengers in the same car. One passenger testified: "As to the plaintiff Johnson, here, having shown that he was under the influence of liquor, I will say that he wasn't the principal actor, and I didn't notice him so much, but I noticed him pass the bottle around. As to my getting a smell of the bottle, I will say that you could tell what was in the bottle—it was whisky. Johnson was apparently quiet in his attitude toward Door, and the talking was being done more by Laundry, although there were two others with Laundry, but they seemed to appreciate the way he was going; that is, I judge so—they didn't try to stop him—in other words, they were lending moral support rather than to try to suppress him. I never heard worse talk any place than this that Laundry was making or carry-

ing on, when these others were not trying to suppress him; it was most decidedly profane and vulgar, and not only that, but Mr. Door wanted to be left alone, and he wouldn't leave him alone. The talk was made in a very loud tone—you could hear it."

Door testified that he informed Johnson and Laundry they were under arrest, and would be put in jail upon their arrival at Missoula. There is also some testimony that Door told them, not that they were under arrest, but that he would have them arrested when they arrived at Missoula. He wired to a special agent of the company, who was a deputy sheriff, and upon the arrival of the train there this agent was present at the depot. The conductor had not taken the men into custody, but, as they stepped off the train, he directed the agent's attention to them, and by him they were taken into custody and placed in jail.

All of this testimony as to being intoxicated and taking part in any controversy, or as to conducting himself in any unseemly manner, was denied by plaintiff and his witnesses. Plaintiff testified that he had had two drinks of beer before boarding the train, but that he drank nothing at all upon the train nor did he see any bottle of liquor in the possession of Laundry or any other passenger. He admits the vomiting, but alleges that this was due to causes other than intoxication. He says that when put under custody upon arrival at Missoula he knew nothing as to the cause of the arrest, and that his conduct upon the train was exemplary.

In addition the testimony shows what followed the taking to jail, the publicity given the arrest, plaintiff's humiliation, *etc.*, and that upon a trial for the criminal offense charged against him, that of drinking intoxicating liquors upon a passenger train, he was acquitted.

The order granting the motion for a new trial was general, and does not set forth the grounds upon which it was granted. The sole error specified by appellant is that the court erred in granting this motion. There is conflict in the evidence.

The trial court was in a more favorable position than this court to pass upon the credibility and weight of the testimony.

As has been often said by this court, when in the opinion [1,2] of the trial court the evidence in a given case preponderates against the finding of the jury, it should be set aside, and where its action in granting a motion for a new trial can be justified upon that theory, the supreme court on appeal will not say that it abused its discretion in granting the motion.

We are asked to review questions of law. However, we are not inclined to pass upon any feature of the case, except that presented by the specifications of error. There were two causes of action. The verdict was general. There is no method by which we may determine whether the jury allowed recovery upon the first or second cause, or upon both. The trial court saw fit to grant the motion for new trial. In this it committed no abuse of discretion. Therefore no useful purpose can be served by discussing rules of law which are not necessary to a decision upon appeal.

The order appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

O'HANLON CO., APPELLANT, v. JESS ET AL., RESPONDENTS.

(No. 4,188.)

(Submitted September 22, 1920. Decided October 27, 1920.)

[193 Pac. 65.]

*Account Stated—Retention Without Objection—Effect—Statute of Limitations—Husband and Wife.***Account Stated—Effect of Retention Without Objection.**

1. Where parties have been engaged in a course of dealings and there is an antecedent indebtedness in favor of one as against the other, and an account or bill purporting to be a statement of the account is rendered by the creditor to the debtor who retains it for an unreasonable length of time (nearly four years in the instant case) without objection, it is evidence of his assent to its correctness and constitutes an account stated, as of the date on which it was rendered.

Same—Definition.

2. An account stated is an agreement, express or implied, that all the items therein contained are correct; it has the force of a contract, the consideration of which is the original account.

[As to what constitutes an open current account within statute of limitations, see note in 1 A. L. E. 1060.]

Same—Cause of Action.

3. In an action on an account stated, the cause of action is the contract created as above (par. 2), and plaintiff must recover upon it and not upon the original account.

Same—Statute of Limitations.

4. Where, at the time an account was stated, the statute of limitations had not intervened against the items contained in the original account, the statement created a new cause of action against which the statute commenced to run only from the date of its rendition.

Same—Husband and Wife—When Wife not Liable.

5. In an action against husband and wife on an account stated for goods, wares and merchandise, where nothing appeared in the complaint or otherwise that the articles were of the character mentioned in section 3707, Revised Codes, for which the separate property of the wife was liable, no account was stated as to her and a judgment against her was therefore unwarranted.

Appeal from District Court, Blaine County; W. B. Rhoades, Judge.

ACTION by the Thos. O'Hanlon Company, Incorporated, against Henry Jess, Jr., and wife. Judgment for defendants

On effect of retaining statement of account to render it an account stated, see notes in 29 L. R. A. (n. s.) 334, and L. R. A. 1917C, 447.

and plaintiff appeals. Reversed, with directions as to named defendant and sustained as to defendant wife.

Cause submitted on briefs of counsel.

Mr. E. J. McCabe, for Appellant.

Where an account is rendered by one person to another, the retention of the same by the latter beyond a reasonable time without objection is evidence of his assent to the correctness of the account and accordingly is evidence of an account stated. (1 Corpus Juris, 691.)

The statute of limitations begins to run against an account stated at the time of the rendering of the account. An account becomes an account stated when furnished to another and he retains it a long time without objection. (*Visher v. Wilbur*, 5 Cal. App. 562, 90 Pac. 1065, 91 Pac. 412.) What is an unreasonable length of time is dependent upon the circumstances. Periods from twenty-five days to two years held unreasonable. (1 Corpus Juris, 695.) Objection to an account rendered must be, to be effective, more than a mere mental operation; it must be communicated to the other party. (1 Corpus Juris, 695.) Objection to an account rendered must be, to be effective, more than a mere mental operation; it must be communicated to the other party. (1 Corpus Juris, 695.) Where an account is stated, the right of action thereon accrues immediately. (1 Corpus Juris, 722.)

Mr. W. H. Kuhr, for Respondents.

Appellant contends that there was an account stated between it and the respondents, and seeks to recover upon that theory; but its cause of action as originally sued on was based on the open account. "An account stated is defined to be an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions." (25 Cyc. 1046.) An account stated gives rise to a new cause of action, namely, on the agreement fixing the amount due.

In this case there never was such an agreement. "An account rendered, or an account closed by cessation of dealings between the parties, * * * , is not an account stated which will set the statute in motion from its date." (25 Cyc. 1134.) There must be something besides mere silence or acquiescence on which to base an agreement of an account stated. "Mere passive silence upon and after receiving the account, or the mere absence of any evidence of objections made by him, is not sufficient." (25 Cyc. 1134.)

Section 6472 of the Revised Codes is conclusive against any recovery by plaintiff. Under this section only a written acknowledgment or promise by the party to be charged thereby can toll the statute.

MR. JUSTICE HURLY delivered the opinion of the court.

This action originated in the justice court on February 7, 1917. Upon appeal to the district court a stipulation was entered into between the parties, which, so far as necessary to this decision, was to the effect that the plaintiff furnished to defendant Henry Jess, Jr., goods, wares and merchandise, between August 25, 1909, and May 2, 1913, and that on May 31, 1913, plaintiff rendered to defendant a statement showing balance due upon the account, to the correctness of which defendant never objected until after action brought, and contained an admission upon the part of the defendant that such balance had not been paid, although demand had been made. The answer pleaded the statute of limitations in bar of the cause of action. Judgment was rendered for defendants, and plaintiff appeals.

It is the theory of the plaintiff that the rendition to and retention by the defendants of the account rendered constituted an account stated. It is contended by the defendant: "The rule that items within the period of limitation draw after them items beyond that period is strictly confined to mutual accounts, showing a reciprocity of dealing between the parties. * * * There must be a mutual or alternate

course of dealing, giving rise to cross-demands, upon which the parties might respectively maintain actions. It follows that where there is no such mutuality of dealing, or where the items are all on one side of the account, the statute runs against each item from its date" (25 Cyc. 1121, and note; *Millett v. Bradbury*, 109 Cal. 170, 41 Pac. 865); and therefore that the cause of action upon the original transaction was barred when the action was commenced. Conceding, but not deciding, that such may be the rule, no question of the statute of limitations having barred action upon the account at the time of the rendition of the account of May 31, 1913, could be well asserted. It, therefore, follows that the account stated, if it came into being at all, did so before the running of such statute as to the original account.

It is quite generally held that where parties have been [1-3] engaged in a course of dealings and there is an antecedent indebtedness in favor of one as against the other, and an account or bill purporting to be a statement of the account is rendered by the creditor to the debtor, who retains the same for an unreasonable length of time without objection, this is evidence of his assent to the correctness of the account, and, accordingly, is an account stated. (See 1 Corpus Juris, p. 691, sec. 276, p. 695, sec. 288. See, also, cases in Decennial and Century Digests, "Account Stated," sec. 6.) In our view, by virtue of the stipulation and the rule here cited, the plaintiff stated its account against the defendant Henry Jess, Jr., on May 31, 1913. "An account stated is an agreement between the parties, either express or implied, that all the items are correct. * * * The action is based upon the agreement, the consideration of which is the original account, and the agreement has the force of a contract. This contract is the cause of action, and the plaintiff must recover upon it, or fail in the action." (*Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427. See, also, *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 83, 98 Pac. 883.)

The California Code of Civil Procedure, section 360, contains [4] a provision found in our section 6472: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

The supreme court of that state, upon conditions somewhat analogous to the instant case, has said: "It is further urged that the court erred in holding that the cause of action accrued at the date the account was stated between the parties (if in fact stated), and that therefore the statute did not apply to any item after January 31, 1878, two years before the alleged statement, and that the court also erred in holding that by silence or acquiescence, or concurrence by unwritten words in the correctness of the account, the defendant could become liable to pay larger interest than 7 per cent per annum.

"An open account, already barred by the statute of limitations, cannot be relieved from the bar of such statute by an oral statement of such account, for the reason that under our Code (Code Civ. Proc., sec. 360) no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing, signed by the party to be charged thereby.

"Where, however, the demand is not barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action, thus brought into existence, from the date of the settlement and new promise arising thereunder; and, if verbal, an action may, under subdivision 1 of section 339 of the Code of Civil Procedure, be brought within two years after such settlement." (*Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371.)

In the later case of *Kahn v. Edwards*, 75 Cal. 192, 7 Am. St. Rep. 141, 16 Pac. 779, the above holding was approved.

Again in *Baird v. Crank*, 98 Cal. 293, 33 Pac. 63, the court said: " * * * It is further strenuously urged that the

plaintiff's cause of action was barred by the statute of limitations pleaded, and that the finding of the court that it was not barred was contrary to and not justified by the evidence. This position is rested upon the theory that the statute began to run against plaintiff's claim when he completed his services on January 20, 1887, and that under section 360 of the Code of Civil Procedure its running was not sustained or affected by the oral statement of the account, and hence that, as more than two years had elapsed when the complaint was filed, the action was barred. It is admitted * * * by the learned counsel that this theory is in direct conflict with the rulings upon the same question in *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371, and *Kahn v. Edwards*, 75 Cal. 192, 7 Am. St. Rep. 141, 16 Pac. 779, but it is claimed that these cases were not well considered, and should be overruled. * * * In answer to the claim that these cases should be overruled, so far as they treat upon the subject in hand, it is enough to say that they are supported by many authorities elsewhere, and in our opinion should be sustained." (See, also, *Brown & Manzanares Co. v. Gise*, 14 N. M. 282, 91 Pac. 716; *Figge v. Bergenthal*, 130 Wis. 594, 110 N. W. 798.)

We, therefore, are of opinion that, there having been a settlement of accounts at a time when the bar of the statute of limitations had not intervened, and the cause of action upon the account stated not being barred at the time of the commencement of the action, the plaintiff was entitled to judgment against the defendant Henry Jess, Jr.

The itemized statement of account, made a part of the [5] stipulation, however, shows that the sales of goods upon which the account is based were made to defendant Henry Jess, Jr., only, and there is nothing in the complaint or otherwise showing that the same were of the character mentioned in section 3707, Revised Codes, nor that the wife was chargeable therefor.

There being nothing to indicate an antecedent debt from the wife to the plaintiff, no account was stated as against her, and she was entitled to judgment.

The judgment of the district court is sustained as to the defendant, Mrs. Henry Jess, Jr., and is reversed as to the defendant Henry Jess, Jr., with directions to that court to render judgment for plaintiff against him for the amount claimed.

Remanded, with directions.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES MATTHEWS and COOPER concur.

DIDRIKSEN, RESPONDENT, v. BROADVIEW HARDWARE
CO. ET AL., APPELLANTS.

(No. 4,193.)

(Submitted September 22, 1920. Decided October 27, 1920.)

[193 Pac. 63.]

Conversion — Damages — Complaint — Sufficiency—Corporate Capacity—Failure to Demur—Waiver.

Conversion—Possession of Property—Complaint—Sufficiency—Inferences.

1. In an action for damages in conversion, where plaintiff alleged ownership of the property at the time of the conversion, and further, that he was lawfully possessed of the same, it was properly to be inferred that he was then entitled to possession.

Same—Right of Plaintiff to Recover Fixed as of Date of Conversion.

2. In an action of the nature of the above, plaintiff's right to damages becomes fixed as of the date of the conversion and does not depend upon his ownership or right to possession at any subsequent time.

Same — Appeal and Error — Corporate Capacity — Defective Complaint — Failure to Demur—Waiver.

3. In the absence of a special demurrer pointing out that the complaint was defective in that the corporate capacity of defendant was alleged only as of the date of the commencement of the action for damages instead of as of the date of the conversion, the formal defect held not fatal when urged for the first time on appeal.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

ACTION by C. A. Didriksen against the Broadview Hardware Company and another. Judgment for plaintiff and defendants appeal. Affirmed.

Cause submitted on briefs of counsel.

Mr. F. B. Reynolds and *Mr. George Crago*, for Appellants.

In order to constitute a cause of action in conversion, the complaint must allege not only a general or special ownership in the personal property, but also actual possession of the property, or the right to its immediate possession by plaintiff at the time of the alleged conversion by defendant. (*Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083; *Paine v. British-Butte Min. Co.*, 41 Mont. 28, 108 Pac. 12; *Glass v. Basin and Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302; *Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413; *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081.)

The complaint fails to state that the defendant has converted property in question. "A conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time." (*Union Stock Yards & T. Co. v. Mallory S. & Z. Co.*, 157 Ill. 554, 48 Am. St. Rep. 341, 41 N. E. 888.) "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." (Cooley on Torts, 428.) It is usual in actions of this kind for the pleader to allege generally that the defendant converted the property to his own use. Such allegation is a proper statement of the act of conversion. (*Reynolds v. Fitzpatrick*, 23 Mont. 52, 64, 57 Pac. 452.) The complaint in this case fails to contain any allegation whatever that defendants converted the property to their own use, and it is only by inference that such conversion can be gathered from the allegations thereof.

The allegation of corporate existence at the time of the transaction is an essential element of plaintiff's cause of ac-

tion. (*McKnight v. Oregon Short Line R. R. Co.*, 33 Mont. 40, 82 Pac. 661; *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413.)

Messrs. Dillavou & Moore, for Respondent.

The contention of appellants that the complaint is defective in that it does not allege the date of ownership of the property as of a certain date, and that the conversion was of the same certain date is without merit. It is not necessary to allege the precise minute or hour of day when the goods were converted or the day of the month. (38 Cyc. 2070, and cases cited.) Nor was it necessary to specify the precise hour or minute of the day alleged as the date of ownership and of the taking. The complaint must be regarded as referring to the whole day, or (as is the same) to the day as a point of time. (*Harris v. Smith*, 132 Cal. 316, 64 Pac. 409; *Rutan v. Wolters*, 116 Cal. 403, 48 Pac. 385; *Newlove v. Pond*, 130 Cal. 342, 62 Pac. 561; *Hunt v. Hammel*, 142 Cal. 456, 76 Pac. 378.) In this case it is obvious that the date of ownership and the date of the taking refer to the same time.

The fact whether or not defendant was a corporation at the time of the conversion is not the gist or substance of the action of conversion, but it simply goes to the right of the defendant to be sued or brought into court. This is a question which should be raised in the trial court or it is deemed waived. (Sec. 6539, Rev. Codes.)

The prevailing view and the rule supported by the great weight of authority is that it is not necessary to allege that defendant is a corporation. This rule is well stated in 10 Cyc., at pages 1347, 1348, as follows: "There is a mass of authority, more or less definite, to the effect that in an action by or against a corporation, whether *ex contractu* or *ex delicto*, it is not necessary to allege the fact that plaintiff or defendant is a corporation."

As sustaining the above proposition, a long list of the most respectable authorities is cited. We find this same proposition

of law laid down in 7 Ruling Case Law, in section 700, at page 697. Cyc. cites for the minority view cases from California, Connecticut, Texas and Iowa. 7 Ruling Case Law, in section 701, at page 698, cites an Idaho and South Dakota case to sustain the minority view. California, in the case of *Los Angeles Ry. Co. v. Davis*, 146 Cal. 179, 106 Am. St. Rep. 20, 79 Pac. 865, overruled her early decisions, and adopted the majority rule that a complaint is not insufficient by reason of the failure to allege the corporate existence of a corporation. This rule was again affirmed in the case of *Crouch v. H. L. Miller & Co.*, 169 Cal. 341, 146 Pac. 880. The courts of Iowa by two late decisions have adopted the majority rule. The leading case for the minority is the case of *Miller v. Pine Min. Co.*, 3 Idaho, 493, 35 Am. St. Rep. 289, 31 Pac. 803, but that case has been expressly overruled by the late case of *Fegtly v. Village Blacksmith Mining Co.*, 18 Idaho, 536, 111 Pac. 129.

Upon investigation we find that the rule of law laid down in 10 Cyc., at pages 1347, 1348, that it is not necessary to allege the fact that plaintiff or defendant is a corporation is the law in the following states, to-wit: Alabama, California, Illinois, Georgia, Indiana, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, West Virginia, Wisconsin, United States and England. As opposed to this rule, we find the citations to an early Connecticut case and a Texas case and the early California and Idaho cases. The courts of California and Idaho have expressly overruled the earlier holdings and they now hold that it is not necessary to allege the fact that defendant is a corporation.

This court has held that the failure of a plaintiff corporation to state in its complaint that it is a corporation does not invalidate the cause of action, provided the complaint is otherwise sufficient. (*Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135; *O'Donnell v. City of Butte*, 44 Mont. 97,

119 Pac. 281; *First Nat. Bank of Iowa City v. Smith*, 44 Mont. 305, 119 Pac. 784.) *A fortiori*, the failure to plead that defendant is a corporation would not invalidate the cause of action.

MR. JUSTICE HURLY delivered the opinion of the court.

This is an action for damages in conversion, in which the plaintiff had judgment, from which defendants appeal. The appeal presents the single question as to whether the complaint states a cause of action. The material portions of the complaint, paraphrased, are as follows: That the defendant Broadview Hardware Company is a Montana corporation; that on or about November 1, 1916, the "plaintiff was the owner of and lawfully possessed of" certain personal property, the value of which is alleged; that on or about the first day of November, 1916; the defendant corporation procured and employed the defendant Harrison to take and seize said goods, and that defendants willfully, wrongfully and unlawfully took the same from the possession of one Meeker, agent of the plaintiff, with whom he had left said goods for safe-keeping "until his return to Broadview, Montana"; that the defendants sold the same, and held the proceeds thereof for their own use and benefit, and thereby wrongfully converted said goods to their own use and benefit, so that the same have become wholly lost to the plaintiff, to his damage; that on or about the twentieth day of January, 1917, "plaintiff returned to Broadview, Montana, met his said agent, and became entitled to the immediate possession of said goods," then for the first time learning of defendants' wrongful acts in seizing and disposing of said property. There follows an allegation of demand for return of the goods, and refusal on the part of the defendants, together with an appropriate prayer for judgment. There was no demurrer, and, so far as appears, the sufficiency of the complaint was not attacked in the trial court. The answer admits that the plaintiff is a corporation, and denies all other allegations of the complaint.

Here the plaintiff alleged his ownership of the property, [1] and that he was lawfully possessed of the same. Certainly it is an inevitable inference from such statement that plaintiff (owner) "lawfully possessed" was then entitled to such possession.

In *Babcock v. Caldwell*, 22 Mont. 460, 56 Pac. 1081, this court said: "Defendant attacks the complaint upon the ground that it fails to state a cause of action by reason of the omission therefrom of an allegation that the plaintiff was the owner and entitled to possession at the commencement of the action. The complaint avers, among other things, that 'on the twenty-fourth day of September, 1895, the plaintiff was the owner and in possession of' the property, and that on said day the defendant took possession of the same, and converted it to his own use. It is not necessary, in a case of this kind, where damages only are recoverable, that plaintiff's ownership and right of possession, or either, should have existed when the action was begun. * * * In an action to recover the possession of chattels, the rule is different. The complaint is sufficient."

Later in the complaint plaintiff states the fact of his return to the state, and that he then became entitled to the immediate possession. This is only explanatory of the agency or custody held by Meeker, and it is fairly inferable that the statement was placed in the complaint in explanation also of the failure to bring action earlier, so that plaintiff could attempt to put himself in position to assert demand for the highest market value of the property between the date of the conversion and the commencement of the action. This statement cannot be said to negative the previous allegation of ownership and lawful possession by plaintiff on the date of the conversion.

Plaintiff's rights to damages were fixed as of the date of the [2] conversion, and not upon conditions of ownership or right to possession as of a later date. (*Sawyer v. Robertson*, 11 Mont. 416, 28 Pac. 456. See, also, *Paine v. British-Butte*

Min. Co., 41 Mont. 28, 108 Pac. 12; *Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083; *Wetzel v. Power*, 5 Mont. 214, 2 Pac. 338.)

The allegations of the complaint as to Meeker show nothing more than a mere naked custody or agency, unaccompanied with any interest or lien in the property, and therefore ~~this~~ possession was in effect the possession of plaintiff.

It is further contended that the complaint is defective, in [3] that corporate capacity is alleged only as of the date of the commencement of the action, and not as of the date of the conversion, and *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413, is cited as follows: "In passing, we may say that the complaint alleges that the defendant was, at the date of the filing of the complaint, a corporation. There is no allegation that it was such at the time of the alleged conversion." This language, however, was not a statement that such a defect was fatal. In *Pearce v. Butte Electric Ry. Co.*, 41 Mont. 304, 109 Pac. 275, this court said: "It is now contended that the complaint does not state facts sufficient to constitute a cause of action, for the reason that, while there is an allegation therein to the effect that the defendant is a corporation, there is no averment showing where or under what law its corporate capacity was established. * * * 1. Both propositions are extremely technical. In so far as the first is concerned, we think it is without merit. The complaint does aver that the defendant is a corporation. This allegation is sufficient to show that it had the legal capacity to be sued. We think this is all that is required. It would seem to be unnecessary for the plaintiff to inform the defendant of the place of its incorporation. It must be better * * * informed on that point than is he."

It will be noted that the complaint throughout alleges that the acts complained of were the acts of the defendants jointly. If the defendant corporation did not participate in the acts charged, this would be a complete defense as to it, as would the fact, if such it were, that it was not a corporation at the

time of the alleged conversion. Defendants, if they desired the complaint more specific, could have filed special demurrer pointing out the defect in the trial court, but upon review here, after a trial upon the issues, where the question is raised for the first time, we deem it too late to urge an objection to a mere formal allegation.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

ZALAC, RESPONDENT, v. BARICH ET AL., APPELLANTS.

(No. 4,189.)

(Submitted September 22, 1920. Decided October 27, 1920.)

[193 Pac. 58.]

Work and Labor—Evidence—Sufficiency—Appeal and Error—Conflict in Evidence.

Work and Labor—Evidence—Sufficiency.

1. In an action for services rendered by plaintiff as cook and servant girl, in which defendants claimed that there was no agreement to pay plaintiff any wages, but that in return for such services as she might render they were to furnish her a home, clothing, entertainment, education, etc., evidence held sufficient to support a judgment for plaintiff.

[As to when payment is due under contract to render services silent as to time of pay, see note in 2 A. L. R. 522.]

Appeal and Error—New Trial—Conflict in Evidence—Affirmance of Judgment.

2. An order denying a motion for new trial will not be reversed where the verdict of the jury and judgment of the court are based on substantially conflicting evidence.

Appeal from District Court, Lewis and Clark County; Wm. H. Poorman, Judge.

ACTION by Minnie Zalac against Joseph and Margaret Barich. Judgment for plaintiff. Defendants appeal from the judgment and an order denying a new trial. Affirmed.

Mr. J. P. Donnelly, for Appellants, submitted a brief.

The verdict of the jury is based upon guesswork, conjecture and speculation. "Where the evidence is so insufficient that the verdict must result on guesswork and conjecture, the court should set it aside." (*Gleason v. Missouri River Power Co.*, 46 Mont. 395, 128 Pac. 586.) "Verdicts may not be returned based upon suspicion, conjecture or probabilities. There must be some substantive concrete evidence to support it." (*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Olsen v. Montana Ore Purchasing Co.*, 35 Mont. 400, 89 Pac. 731; *McHatton v. Girard*, 41 Mont. 387, 109 Pac. 704.) The great weight of the evidence and all the conceded facts and circumstances of the case, and all the reasonable inferences and probabilities, are contrary to the verdict as rendered by the jury. "It is undoubtedly the duty of an appellate court to award a new trial where the verdict, though not entirely without evidence to support it, is so utterly at variance with the real and unexplained facts as that the court can say it is clearly wrong." (*Roberts v. Agnew* (Tex. Civ. App.), 103 S. W. 1178; *McAllister v. McDonald*, 40 Mont. 375, 106 Pac. 882; *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471.)

Mr. E. D. Phelan, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

The complaint alleges that between the nineteenth day of February, 1910, and the 19th of June, 1916, at the special instance and request of defendants, the plaintiff rendered services to them, as cook, housekeeper and servant girl, of the reasonable value of \$25 per month, for which they agreed to pay a reasonable wage, and that only \$334 of the \$1,566 alleged to be due plaintiff has ever been paid.

The answer consists of a general denial, supplemented by affirmative allegations to the effect that, in consideration for

the services rendered by plaintiff, defendants agreed to and did furnish plaintiff with a home, and treated her and cared for her as their own child; that the plaintiff was informed and understood that, if she desired to work for wages elsewhere, she was at liberty to do so, because defendants could not afford to pay her any wages or salary, but that plaintiff preferred to remain with defendants and enjoy the benefits of the home so provided, and that, in addition to the home, "defendants expended a sum of money in so providing a home, rendered entertainment and education for said plaintiff, vastly in excess of the sum demanded by plaintiff in her complaint." Upon these issues a trial was had, resulting in a verdict for plaintiff in the sum of \$750. This appeal is from the judgment and an order denying defendants a new trial.

Refusal of the trial court to grant defendants a new trial is the principal ground urged upon this appeal, the contention of appellants being that the proof offered by the plaintiff failed to establish the date upon which the agreement was made, and that, for that reason, the verdict is based upon guesswork, conjecture and speculation, and ought not to be permitted to stand.

So far as the overruling of the motion for a new trial is [1] concerned, it is only necessary to say that the evidence given by plaintiff was sufficient to convince the jury of the truth of the allegations of her complaint, to the effect that she came to the home of the defendants at East Helena from Austria, in February, 1910; that she lived with them for a period of nearly seven years, during all of which time she performed the usual household duties, including washing dishes, doing the family washing, scrubbing the floors, milking the cows, delivering milk in the neighborhood, assisting Mrs. Barich, the wife of her codefendant, Joseph Barich, in the cooking and other work necessary to carry on a boarding-house, and during the first year after her arrival at the home of defendants assisting them in the building of a house adjoining their residence; for all of which the defendants agreed

to pay a reasonable wage. It is not disputed that the defendants sent plaintiff a ticket upon which to travel from Austria to their home at East Helena, at a cost to them of \$104, gave her as spending money about \$30, and provided wearing apparel at a cost of about \$200, during the period covered by the pleadings, amounting in all to about \$334, between the time she arrived at the home of defendants from Austria and left it to get married.

On behalf of defendants evidence was adduced in support of the affirmative allegations of their answer. They themselves testified that they never promised or agreed to pay plaintiff any wages, but that it was agreed between them that plaintiff should make her home with defendants and live with them as long as it was mutually agreeable, without any compensation other than the benefits afforded by the home so provided her, including her clothing, entertainment and education, the value of which was far in excess of the amount demanded by her as wages, and that, as a consequence thereof, defendants owed her nothing.

The district court, in passing upon the sufficiency of the evidence to sustain the verdict, refused to grant defendants a new trial, and thereby signified its conclusion that the plaintiff had made out a case entitling her to the verdict she received at the hands of the jury, and that the defendants had failed to overcome the preponderance of the evidence found by the jury to exist in favor of the plaintiff.

From a careful review of the testimony given to support [2] the respective theories urged by the parties, it is apparent to us that there was a substantial conflict in it, and enough competent proof to uphold the judgment awarded the plaintiff. As has been many times announced by this court in cases presenting the condition now confronting us, the verdict of the jury and the judgment of the district court, attacked upon the ground that the evidence was insufficient to justify them, cannot be disturbed. (*Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265.)

No error is assigned touching the competency of the proof admitted upon the trial, nor in the instructions given. The jury and the trial court had before them the witnesses, observed their demeanor upon the stand, the probability of the truth of their respective stories, and upon the whole case have accepted the plaintiff's account of the transaction. Appellants have failed to convince us that a different result ought to have been reached. We are therefore constrained to affirm the order and judgment appealed from.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HURLY concur.

MISSOULA BELT LINE RY. CO., APPELLANT, v. SMITH
ET AL., RESPONDENTS.

(No. 4,201.)

(Submitted September 24, 1920. Decided November 8, 1920.)

[193 Pac. 529.]

Default Judgments—Setting Aside—Attorney and Client—Challenging Attorney's Right to Act—Appearance—Extending Time—Jurisdiction—Presumptions—Waiver.

Appearance—Motion Challenging Jurisdiction—Effect.

1. Under section 6719, Revised Codes, the filing by defendant of a motion challenging the jurisdiction of the court before he interposes his answer or demurrer extends the time for making appearance on the merits until the motion is determined.

Default Judgments—Power of Clerk to Enter.

1a. Held, that under section 6719, Revised Codes, above, the power of the clerk of the district court to enter a default in any case is restricted to those in which no appearance, either general or special, has been made.

Attorney and Client—Authority of Attorney to Appear—Want of Authority—Dismissal of Action.

2. The district court may, under section 6423, Revised Codes, on motion of either side made in good faith and upon a showing supported by affidavit or otherwise, require the attorney of the adverse party to produce and prove the authority under which he appears,

and if it be shown that the attorney for plaintiff has no such authority, dismiss the action.

Same—Presumptions.

3. An attorney is presumed to have authority to appear for the party he assumes to represent, until the contrary is shown.

[As to authority of attorney to confess or consent to entry of judgment, see note in *Ann. Cas.* 1914C, 548.]

Same—Challenging Authority of Attorney to Act—Time.

4. *Semble*: While the statute does not declare when a motion of the character of the above must be made, it would seem that it should be made whenever during the progress of the case the party desiring to present the question comes into possession of facts furnishing a reasonable ground for the belief that the attorney for the adversary party is acting without authority.

Same—Challenging Authority of Attorney to Act—Waiver.

5. Where defendant desires to make a motion calling upon plaintiff's attorney to show by what right he appears in the cause, he should make it upon his first appearance or at the earliest time he can make it, otherwise he will be deemed to have waived his right to make it.

Same—Motion Challenging Attorney's Authority—Jurisdiction.

6. Since the word "jurisdiction" as used in section 6719 above means the power of the district court to hear and determine a cause, which power ceases when it is shown that the action was brought without authority, a motion of defendant challenging the right of the attorney for plaintiff to appear is, in effect, one advising the court that it has not properly acquired the power to hear and determine, and therefore one challenging jurisdiction.

Same—Setting Aside Default—When Proper.

7. *Held*, that where the clerk of the district court entered defendants' default, although within the time for making appearance they had filed a motion requiring plaintiff's attorney to show his authority for appearing, which motion had not been called to the court's attention for determination, an order granting the motion to set aside the default was proper.

Appeal from District Court, Missoula County; Theodore Lentz, Judge.

ACTION by the Missoula Belt Line Railway Company against George P. Smith and others. From an order granting defendants' motion to set aside a default judgment plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

Mr. S. J. Bischoff and *Mr. E. C. Mulroney*, for Appellant.

The special appearances and motions made by defendants were not such proceedings as are contemplated by section 6719

of the Revised Codes; hence did not prevent entry of judgment upon the expiration of twenty days from the date of service. Under the above section a general appearance can only be made by interposing an answer or a demurrer. There is no Code provision recognizing the practice of filing a general appearance independent of an answer or demurrer. The defendants having failed to interpose either demurrer or answer, no general appearance was made by the defendants. The proceeding that was taken by the defendants was the filing of special appearances coupled with motions. The question that presents itself is this: Are the motions which were coupled with the special appearances such motions as are contemplated by section 6719? For only such motions as are contemplated by that section will prevent the entry of a default. We contend they are not. It is clear that the legislature intended that whatever motion should be made must be one that is an attack on the jurisdiction of the court, an attack on the complaint or an answer to the facts set forth in the complaint or an answer by way of demurrer. This is in effect the construction placed upon the section of this court in *Donlan v. Thompson Falls etc. Co.*, 42 Mont. 257, 112 Pac. 445. The two motions interposed here do not raise any question of jurisdiction, nor do they attack the complaint in any manner. The motions raised an independent or ancillary inquiry as to the authority of the officer who instituted the action to do so. This inquiry does not affect the cause of action against the defendants, but is one that can be raised, if at all, between the corporation and its officers only. (See *Naderhoff v. Geo. Benz & Sons*, 25 N. D. 165, 47 L. R. A. (n. s.) 853, 141 N. W. 501; *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836; *Murphy v. Minot Foundry etc. Co.*, 24 N. D. 185, 139 N. W. 518.)

The last case cited is in many respects similar to the case at bar. In both cases the motions were to dismiss, the action was on contract, and in both cases the motion was not one that went to the merits of the action but presented an ancil-

lary inquiry. As in the case cited, the appearances so called filed by the defendants are anomalous papers, the motion is unknown to the practice in this state, and counsel have failed to call attention to a single instance in which so strange a motion was presented and urged as an arrest of the running of the time. The instruments in this case did not present any questions of law or fact and were therefore nullities, at least for the purpose of preventing the running of defendants' time.

In *McDonald v. Swett*, 76 Cal. 259, 18 Pac. 324, the supreme court of California held: "It was not sufficient ground for setting aside the default that it was entered pending the hearing of the motion to dismiss. * * * The motion to dismiss the action did not extend the time to answer."

Under section 6719 the three ways of preventing default enumerated in subdivision 1 all relate back to the first part of the section, which limits the subdivision to the answer or attack on the jurisdiction, and since the motions do not attack the complaint or challenge the jurisdiction of the court, they did not prevent default from being entered.

Mr. Harry H. Parsons and Mr. Thomas N. Marlowe, for Respondents.

In the case of *Donlan v. Thompson Falls etc., Co.*, 42 Mont. 257, 112 Pac. 445, this court pointed out the things which could be done under section 6719, enacted by Laws of 1905, Chapter 59, so as to prevent the default of a party when served from being entered, and it is therein held, the first is by an answer or demurrer to the complaint; the second is by a motion filed in the main action; and the third is by a special appearance coupled with the motion. It is our contention that the motion filed—or at least the motion to dismiss—met all the demands of the second and third requirements laid down by the court in this case, and while it was called a special appearance, that did not make it so, and if the relief demanded could not have been granted except by the

defendants appearing generally, they will be deemed to have so appeared. By invoking the jurisdiction of the court in asking for a dismissal of the case, they appeared generally, even though such appearance was designated as a special one. A motion to dismiss has almost uniformly been held to amount to a general appearance. In the case of *State ex rel. v. Napton*, 24 Mont. 450, 62 Pac. 686, it was held by this court that a motion to quash and dismiss was a general appearance. There the court said: "In his motion to quash and dismiss he appeared generally and thereby cured the supposed defect in the service." (*Teater v. King*, 35 Wash. 138, 76 Pac. 688; *Jones v. Jones*, 59 Or. 308, 117 Pac. 414; *Nichols etc. Co. v. Baker*, 13 Okl. 1, 73 Pac. 302; *Dudley v. White*, 44 Fla. 264, 31 South. 830; *Blair v. Henderson*, 49 W. Va. 282, 38 S. E. 552; *Norfolk etc. R. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, Ann. Cas. 1912A, 239, 68 S. E. 346; *Everett v. Wilson*, 34 Colo. 476, 83 Pac. 211; *McKillip v. Harvey*, 80 Neb. 264, 114 N. W. 155; *Rosenberg v. United States Fidelity & Guar. Co.*, 115 Va. 221, 78 S. E. 557; *Hudson Coal Co. v. Hauf*, 18 Wyo. 425, 109 Pac. 21.)

In the case of *Thompson v. Pfeiffer*, 66 Kan. 368, 71 Pac. 828, it was held that "a motion to dismiss, though called and designated a special appearance, was in fact a general appearance." In 4 Corpus Juris, page 1340, it was held that "a general appearance results from the making of the motion to dismiss." We think that these cases clearly show that the motion to dismiss constituted a general appearance, even though designated a special one, because the motion so made "invoked the jurisdiction of the court on the merits and asked for relief which presupposes jurisdiction has attached," and we are clearly of the opinion "that it attacks the complaint" and was such a motion, "the granting of which was inconsistent with the idea that the plaintiff was entitled to recover judgment by default upon the complaint as filed," and the granting of this motion, the good faith and grounds of which was set forth in the affidavit in support of the same,

and made a part of it, would have ended the whole case. In any event, the motion made was a special appearance, coupled with a motion which is one of the things the defendants, under section 6719, could do to prevent their default being entered.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On September 7, 1917, the plaintiff commenced an action in the district court of Missoula county to recover the sum of \$8,000, with interest, which it was alleged the defendants had collected for the use and benefit of the plaintiff, but had failed and refused to pay to it. The defendants were on that day served with summons and a copy of the complaint. On September 20 the defendants filed with the clerk and served upon attorneys for plaintiff a motion asking the court to require the said attorneys to produce and prove their authority to appear as such in the action, and to order a stay of proceedings until such authority should be produced. On the same day they filed and served a motion asking that the action be dismissed, on the ground that it had not been properly brought, in that it had not been authorized by anyone having the right to do so. Each of these motions recited that defendants appeared specially for the purpose of the motion only. The second motion was supported by an affidavit by defendant George P. Smith, president of the plaintiff. The purpose of the affidavit was to show that the action had not been authorized by plaintiff corporation, but had been commenced by one Oettinger, who was without authority to act for the plaintiff in any capacity whatever. On September 29, before either of the motions had been called to the attention of the court, or heard and disposed of by it, the plaintiff, through its attorneys, filed a præcipe with the clerk to enter the default of the defendants for failure to answer or otherwise make their appearance within the time required by law. The clerk thereupon entered the default, and immediately

thereafter entered judgment against the defendants for the amount claimed in the complaint. On October 1 the defendants filed their motion to set aside the default and the judgment. This motion was supported by affidavits setting forth at length the facts upon which the defendants relied for their defense. On November 12, the court, after a hearing, granted defendants' motion. From this order plaintiff has appealed.

The question submitted for decision is whether, under the [1] provisions of section 6719 of the Revised Codes, the pendency of defendants' motions, or either of them, precluded the entry of the default and judgment by the clerk. If the answer is in the affirmative, the order appealed from must be affirmed, for in that case the defendants were entitled as of right to have the motions disposed of before they could be put in default. The purpose of the two motions was the same. They will therefore hereafter be referred to and treated as one.

Section 6719, so far as pertinent here, declares:

"Judgment may be had, if the defendant fail to answer the complaint *or to challenge the jurisdiction of the courts* as follows:

"1. In an action arising upon contract for the recovery of money or damages only, if no answer, *demurrer, motion or special appearance, coupled with a motion* has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, *or on motion to quash or set aside the service of summons, or to challenge the jurisdiction of the court has been made and filed*, the clerk upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the complaint, including the costs, against the defendant or against one or more of several defendants, in the cases provided for in section 6524.

• • • "

The portion of this section quoted is subdivision 1 of section 1020 of the Code of Civil Procedure of 1895, as amended by

section 1 of Chapter 59 of the Laws of 1905; the italicized clauses indicating the amendments made at that time.

Section 1020, *supra*, was first enacted by the territorial legislature in 1867. (Laws 1867, p. 162, sec. 150.) It continued thereafter to be the law on the subject in this jurisdiction until it was amended, as above indicated. In the case of *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591, there was presented the question whether, under subdivision 2 of the section which contained the same provision as subdivision 1 relating to the clerk's duty to enter default, a special appearance, coupled with a motion to quash the service of summons, extended the time for general appearance and answer to the merits of the action. The court held that it did not, and affirmed an order of the district court of Silver Bow county denying a motion to vacate a judgment entered on default of defendants after a motion to quash the summons had been filed. This decision was rendered on December 1, 1904. At its next session the legislature amended the section by incorporating the italicized clauses in subdivision 1, which applies to actions on contract for the recovery of money or damages only. Substantially the same amendments were made to subdivision 2, which applies to all actions other than those mentioned in subdivision 1. Subdivision 3, which applies to actions in which summons has been served by publication, was also amended, so as to require, in addition to that theretofore necessary to be made on application for judgment, proof that no motion has been filed to set aside the service of summons or to challenge the jurisdiction of the court. The amended section is not couched in the most appropriate terms and contains some repetition, but the purpose of the legislature¹ in enacting it is not open to question. Manifestly its intention was to relax what it regarded the harshness of the rule of the older provision as interpreted by this court in the case of *Mantle v. Casey*, and to permit the defendant to challenge the jurisdiction of the court by motion before he interposes his answer or demurrer, without

assuming the risk of being declared in default by the clerk. In its effort to relax the rule it went to the extreme of liberality, because it made the mere filing of the motion with the clerk sufficient to extend the twenty days allowed for appearance for defense on the merits, until the motion is [1a] determined. The result is that the power of the clerk to enter a default in any case is now restricted to those in which no appearance, either general or special, has been made. It is true that the motion must in some way challenge the jurisdiction of the court.

Counsel strenuously insist that neither of the motions raises any question of jurisdiction, in that neither is directed at the complaint or summons. They cite and rely upon the case of *Donlan v. Thompson Falls etc. Co.*, 42 Mont. 257, 112 Pac. 445, in which this court had under consideration subdivision 2, and held that notice of motion to dissolve an injunction which had been issued in the action was not such an appearance as would prevent the entry of default by the clerk though filed within twenty days after service of summons. The facts were these: The defendants were all personally served with summons on August 17. On the same day a temporary injunction was issued and served. On September 4 the defendants, by their counsel, served upon counsel for the plaintiff and filed with the clerk a notice that they would on September 15 move the court for an order dissolving the injunction. On September 8 the clerk, on application of plaintiff, entered their default. A motion by defendants to vacate the default was denied. The plaintiff then submitted his evidence, and judgment was entered in his favor. Defendants again moved the court to vacate the default and judgment. This motion was denied. Defendants appealed. The principal contention made in their behalf was that the notice of their intention to move for a dissolution of the injunction, with the affidavits accompanying it, was an appearance in the action, sufficient to prevent entry of default by the clerk. Their contention was overruled, the court pointing out that,

to save a default under the statute, appearance must be made in the action either (1) by answer or demurrer; or (2) by motion such as amounts to a general appearance; or (3) by special appearance, coupled with a motion. It will be observed that the statute does not declare what must be the particular character of the motion, further than to require that it must in some way challenge the jurisdiction of the court. If it does this in any way, it comes within the purview of the statute.

Section 6423 of the Revised Codes authorizes the court, [2] on motion of either party, to require the attorney of the adverse party to produce and prove the authority under which he appears. The purpose of this provision is to compel disclosure by counsel who appears for plaintiff on the one hand, whether the action has been commenced at the instance and by the consent of the person who is the ostensible plaintiff, or, on the other hand, whether the defendant has authorized counsel who appears for him to so appear and interpose a defense to the action. In either case if it is shown that the attorney has no authority to represent the party for whom he assumes to act, he will not be permitted to act further, and if he is prosecuting the action without the permission of the ostensible plaintiff, whom he professes to represent, the action will be dismissed. Even in the absence of such a statute the court has the inherent power, either on its own motion or on motion of a party to the action, to require an attorney to produce evidence of his authority whenever there is reasonable ground to apprehend that he is proceeding to act without authority of the party he assumes to represent. (2 R. C. L. 981; *Keith v. Wilson*, 6 Mo. 435, 35 Am. Dec. 443; *Belt v. Wilson's Admr.*, 6 J. J. Marsh. (Ky.) 495, 22 Am. Dec. 88; *Clark v. Willett*, 35 Cal. 534.) The motion by either party must, of course, be made in good faith and be supported by a showing, by affidavit or otherwise, of a reasonable cause [3] for it. This is necessary because an attorney is presumed to have authority until the contrary is shown. (*State*

to Use of West v. Houston, 3 Harr. (Del.) 15; *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, and note to this case, 16 Am. Dec. 93; *Williams v. Johnson*, 112 N. C. 424, 34 Am. St. Rep. 513, 21 L. R. A. 848, and note, 17 S. E. 496.)

The statute does not declare when the motion should be [4,5] made. It would seem, however, that it should be made whenever during the progress of the case the party desiring to present the question comes into the possession of facts furnishing a reasonable ground for the belief that the adversary attorney is acting without authority. It would seem, also, most appropriate that the defendant, if he desires to do so, should make his motion upon his first appearance in the action. In any event his motion should be made at the earliest time he can make it. Otherwise, he may be deemed to have waived his right to move at all.

The question arises, then: Does the motion challenge the [6,7] jurisdiction of the court? The term "jurisdiction," as used in the statute, is the power to hear and determine the particular case. This power is called into activity by the commencement of the action by a party who invokes it, to enforce a claim against the defendant, or to redress or prevent a wrong done or being done by him. The action is commenced by the filing of a complaint. This must be the voluntary act of the plaintiff. He thus submits his cause for adjudication. No one else can do this for him, unless he is a minor, or an incompetent ward, under the control of a guardian. Even then, in contemplation of law, the action is that of the ward. When, therefore, it is shown that an action has been brought by another as an attorney in the name of the plaintiff without authority, the power of the court to proceed to adjudication of it ceases. The defendant cannot lawfully be held to answer or make defense. He is at liberty to defend an action brought against him if he chooses, but may abstain from making any defense. He is entitled to notice by service of process, but cannot be brought into court and required to defend against his will.

Much less may he be lawfully brought into court to defend an action by one who is not the owner of the cause of action brought against him. By their motion defendants sought to advise the court that it had not properly acquired jurisdiction of the cause of action alleged in the complaint, and thus that it was without power to proceed to judgment. In other words, they sought to uproot the action entirely and summarily end it. In this sense the motion challenged the jurisdiction, within the meaning of the statute. This conclusion requires an affirmative answer to the question submitted by counsel.

It is insisted that under the decision in the *Donlan Case*, *supra*, a motion within the purview of the statute must attack the complaint in some way. By their motion defendants sought to have the action summarily ended. This presented the question whether a valid judgment could be rendered upon the complaint.

Counsel suggest and discuss in their brief the question whether defendants' motion constituted a general or special appearance. This inquiry is not material. Whether it constituted the one or the other, it precluded the entry of default and judgment until it should be determined. The order is affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

STATE, APPELLANT, v. LIBBY YARDS CO., RESPONDENT.

(No. 4,591.)

(Submitted September 20, 1920. Decided November 8, 1920.)

[193 Pac. 394.]

Criminal Law—Information—Demurrer Sustained—Record on Appeal by State.

1. Where the state appeals from an order sustaining a demurrer to an information, it must present the information, with the demurrer and the trial court's ruling thereon, in a bill of exceptions duly settled and allowed, under the mandatory provisions of section 9347, Revised Codes, else the supreme court is without jurisdiction to entertain the appeal.

Appeal from District Court, Sheridan County; C. E. Comer, Judge.

FROM an order sustaining a demurrer to an information against the Libby Yards Company, the State appeals. Appeal dismissed.

Cause submitted on briefs of Counsel.

Mr. S. C. Ford, Attorney General, and *Mr. Otto A. Gerth*, Assistant Attorney General, for Appellant.

Messrs. Powell, Carman & Cain, of the Bar of Minnesota, and *Messrs. Galen & Mettler* and *Mr. A. T. Vollum*, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The state has appealed from an order sustaining a demurrer to an information and challenges the correctness of the trial court's ruling.

At the outset we are met with the objection of respondent [1] that this court is without authority to consider the appeal, because the appellant has failed to furnish the record re-

quired by statute, and the time for preparing such a record has long since passed. The transcript before us consists of the information, the demurrer, the court's ruling, the notice of appeal, and clerk's certificate. Since the adoption of the Codes of 1895 the state has enjoyed the right to appeal from a judgment for the defendant on a demurrer to an indictment or information (sec. 2273, Pen. Code 1895; sec. 9398, Rev. Codes), and the order sustaining the demurrer constitutes the judgment (sec. 1925, Pen. Code 1895; sec. 9203, Rev. Codes). Prior to 1903 no specific procedure for presenting such appeal was prescribed by law. Section 2275, Penal Code (sec. 9400, Rev. Codes), provided that the appeal was taken by filing a notice of appeal and serving a copy of the same. Section 2281, Penal Code (sec. 9406, Rev. Codes), provided that, upon the appeal being taken, the clerk of the district court should transmit to the clerk of the supreme court a copy of (1) the notice of appeal, (2) the record of the action, and (3) all bills of exceptions and the instructions with the indorsements thereon. Section 2176, Penal Code of 1895 (sec. 9345, Rev. Codes), provided that the decision of the court sustaining a demurrer to the information was deemed excepted to and no bill of exceptions was required.

Section 2229, Penal Code of 1895 (sec. 9376, Rev. Codes), provided for a judgment-roll—designated “record of the action”—but only in a case which has been tried upon the merits resulting in a conviction. No provision whatever was made for a judgment-roll or “record of the action” in a case terminated by an order sustaining a demurrer to the information; and, though the right of appeal was given to the state in such a case, no provision was made for a record upon which the appeal could be presented. This lapse in legislation was supplied by Chapter 34, Laws of 1903. Section 2 of that Act, now section 9347, Revised Codes, provides: “The only method of preserving for review by the supreme court on appeal, any proceeding, evidence or matter not designated by the Penal Code as part of the record on appeal without

bill of exceptions, shall be by bill of exceptions prepared and settled under either section 2171 of the Penal Code or this Act, as the one or the other may be appropriate; thus (for example) the following mentioned papers and matters must be included in such a bill if the party aggrieved would have them reviewed: Motions to set aside an indictment or information, with the matter in support thereof not otherwise appearing of record; demurrers to indictments or information," etc.

The statute is mandatory—its terms too plain to be open to controversy. If, in a case of this character, the state would have the trial court's ruling upon the demurrer reviewed, it must present the information, with the demurrer and ruling in a bill of exceptions duly settled and allowed. These matters of procedure are purely statutory. Our Constitution (sec. 15, Art. VIII) declares that writs of error and appeals shall be allowed from the decisions of the district courts to the supreme court under such regulations as may be prescribed by law. Since a bill of exceptions was not settled and the time within which such a bill might be presented has long since expired, this court is without authority to consider the appeal.

The appeal is therefore dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY and MATTHEWS concur.

SCHUMACHER, ADMR., RESPONDENT, v. MURRAY HOSPITAL ET AL., APPELLANTS.

(No. 4,158.)

(Submitted June 4, 1920. Decided November 8, 1920.)

[193 Pac. 397.]

*Physicians and Surgeons—Malpractice—Expert Testimony—
Extracts from Text-books—Evidence—X-ray Photographs—
Instructions.*

Trial—Incomplete Instructions—Duty of Appellant.

1. Failure to offer an instruction on the issues involved, more complete than the one submitted to the jury, bars the appellant from complaining of the one given.

**Physicians and Surgeons—Malpractice—Evidence—Direct Examination—
Extracts from Medical Text-books Inadmissible.**

2. In an action against a hospital and attending physicians for malpractice it is error to permit counsel for plaintiff to incorporate in his questions to physicians in his case in chief statements from text-books on medical subjects.

Same—Extent of Care of Patient Required.

3. A patient who places himself in the care of a physician for a fractured hip-joint is entitled to an ordinarily careful and thorough examination, such as the circumstances, his condition and the physician's opportunities for examination permit and demand.

Same—Failure to Take X-ray Photograph—Negligence—Jury Question.

4. The question whether the conditions surrounding decedent at the time he was taken to the hospital and during the time he remained there for treatment for an impacted fracture of the hip-joint demanded the use of the X-ray was one for the jury's determination.

Same—X-Ray Photograph—Instruction—Improper Refusal.

5. *Held*, in view of the testimony of plaintiff's expert witnesses as to the circumstances under which they would use the X-ray, that the court erred in refusing defendants' offered instruction to the effect that the jury could not consider any reference to their failure to take an X-ray picture of decedent's hip unless plaintiff had proved that it was usual and customary under the circumstances for ordinarily skillful and careful physicians to take one, and that proof of such failure was not by itself evidence of negligence.

Appeal and Error—Settlement of Instructions—Failure to Object—Effect.

6. Grounds of objection to an instruction not urged at the settlement of the instructions will be disregarded on appeal.

Physicians and Surgeons—Failure of Patient to Obey Directions—Inapplicable Instruction.

7. Defendants' requested instruction that, if deceased had refused to adopt the remedies prescribed by or comply with the physicians' directions, and such refusal proximately contributed to his death, there could be no recovery, *held* properly refused in the absence of a plea of contributory negligence or substantial evidence showing such condition.

Same—Force of Expert Medical Testimony—Improper Instruction.

8. Defendants' requested instruction that the question whether or not they exercised reasonable and ordinary care and skill in the treatment of decedent was to be determined from the expert testimony of physicians and surgeons alone, *held* properly refused as taking from the jury consideration of the evidence of lay witnesses concerning conditions upon which their testimony was relevant and material.

Same—Expert Testimony—Proper Instruction.

9. Refusal of defendants' requested instruction that expert testimony based on hypothetical questions is entitled to importance only when fairly given by one properly accredited by his experience and study, *etc.*, *held* improper.

Trial — Cross-examination — Instruction to Disregard Testimony — Proper Refusal, When.

10. Where a party on cross-examination elicits statements in a colloquy with the witness upon a matter not touched upon in his direct examination, he is in no position to complain of the trial court's refusal to instruct the jury to disregard it.

Physicians and Surgeons—Methods of Treatment—Negligence.

11. *Held*, that it was error to refuse defendants' offered instruction that a physician or surgeon is not bound to use any particular method of treatment, and that if among practitioners of ordinary skill and learning more than one method of treatment is recognized as proper, it was not negligence for defendants to adopt either of such methods.

Same—Diagnosis of Injury—Error of Judgment not Negligence.

12. Error of judgment on the part of a physician or surgeon resulting in an incorrect diagnosis of a disease or injury does not alone render him liable in damages; nor does the fact that others might have adopted a different method of treatment convict him of negligence or want of skill or care; but if the method adopted has substantial medical support, it is sufficient.

[Liability of physician for lack of diligence in attending patient, see note in *Ann. Cas.* 1912C, 831.]

Same—Nonsuit—When Denial Proper.

13. Motion for nonsuit was properly denied in a malpractice case where, though most of the testimony of plaintiff's experts was not direct as to defendants' negligence and want of care or skill, one expert categorically stated that the treatment given the patient showed lack of care.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by H. J. Schumacher, as administrator of the estate of Edson Currier, deceased, against the Murray Hospital, a corporation, and others. From judgment for plaintiff and an order denying their motion for new trial, defendants appeal. Reversed and remanded.

Messrs. Walker & Walker, Messrs. Kremer, Sanders & Kremer and Mr. James E. Murray, for Appellants, submitted

a brief; *Mr. Louis P. Sanders* and *Mr. Murray* argued the cause orally.

There can be no recovery in a malpractice case without medical expert testimony to show lack of requisite skill and care on the part of the defendant. (*Ewing v. Goode*, 78 Fed. 442; *Sheldon v. Wright*, 80 Vt. 208, 67 Atl. 807; *Phebus v. Mather*, 181 Ill. App. 274; *Miller v. Toles*, 183 Mich. 252, L. R. A. 1915C, 595, 150 N. W. 118; *Zoterell v. Repp*, 187 Mich. 319, 153 N. W. 692; *Ball v. Skinner*, 134 Iowa, 298, 111 N. W. 1022; *Wilkins' Admr. v. Brock*, 81 Vt. 332, 70 Atl. 572; *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870; *Miller v. Toles*, 183 Mich. 252, L. R. A. 1915C, 595, 150 N. W. 118.) Where there is a difference of opinion among practical and skillful surgeons as to the practice to be pursued in certain cases, a surgeon may exercise his own best judgment, employing the methods his experience has shown to be best, and error of judgment will not make him liable in damages. (*Van Hooser v. Berghoff*, 90 Mo. 487, 3 S. W. 72; *Ewing v. Goode*, *supra*; *English v. Free*, 205 Pa. St. 624, 55 Atl. 777; *De Long v. De Laney*, 206 Pa. St. 224, 55 Atl. 965; *Staloch v. Holm*, 100 Minn. 276, 9 L. R. A. (n. s.) 712, 111 N. W. 264.) A physician is not liable for an error in diagnosis, but in performing an operation, he is employing surgery as an art, and is then liable for negligence. (*Burnett v. Layman*, 133 Tenn. 323, 181 S. W. 157; *Nickerson v. Garish*, 114 Me. 354, 96 Atl. 235; *Von Boskirk v. Pinto*, 99 Neb. 164, 155 N. W. 889; *Sims v. Parker*, 41 Ill. App. 284.)

“Where the method adopted is shown to have the support of a respectable minority of physicians and was not unusual or experimental, a physician is not guilty of negligence”; and “That a physician adopted a particular method in reducing a fracture does not, where it had considerable medical support, show him to be guilty of negligence.” (*Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31; *Dahl v. Wagner*, 87 Wash. 492, 151 Pac. 1079; *Houghton v. Dickson*, 29 Cal. App. 321, 155 Pac. 128.)

Were the testimony of respondent of such a character as to justify an argument that the appellants were negligent in not taking an X-ray picture, it is still not negligent in all cases to omit the use of an X-ray. There is no evidence in the record that an X-ray was usually employed by physicians or surgeons in similar localities under similar circumstances. This is the true and vital test. In the case of *Beadle v. Paine*, 46 Or. 424, 80 Pac. 903, it is held that an instruction to the effect that it is not negligence not to have employed an X-ray unless it was usually employed by physicians and surgeons in that locality, stated the correct rule of law. (See, also, *Wells v. Ferry-Baker Lumber Co.*, 57 Wash. 658, 29 L. R. A. (n. s.) 426, 107 Pac. 869; *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172; *Nickerson v. Garish*, 114 Me. 354, 96 Atl. 235.)

We invite the attention of the court to the following cases which render it clear that our contention that the evidence is insufficient is irresistible: *Ewing v. Goode*, 78 Fed. 442, 444; *James v. Robertson*, 39 Utah, 414, 117 Pac. 1068; *Merriam v. Hamilton*, 64 Or. 476, 130 Pac. 406, 408.

Counsel in interrogating the witness Kistler, on direct examination, read from a medical treatise by Scudder. Such examination is error. In some states it is allowable on cross-examination, but so far as we can discover it is not permissible on direct. Under a statute similar to ours, the supreme court of California has held that medical works may not be read to the jury. (*Gallagher v. Market Street Ry. Co.*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869; *City of Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 678; *In re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434; *Pahl v. Troy City Ry. Co.*, 81 App. Div. 308, 81 N. Y. Supp. 46; *Elliott v. Ferguson*, 37 Tex. Civ. 40, 83 S. W. 56; 2 Ency. of Evidence, 589 *et seq.*)

Messrs. Maury, Wheeler & Melzner and *Mr. Louis E. Haven*, for Respondent, submitted a brief; *Mr. Haven* and *Mr. B. K. Wheeler* argued the cause orally.

Counsel contend that because defendants used their best judgment, they could not be held liable. "It is a mistake

to say that if even an expert does what his judgment approves, he cannot be found negligent." (*Oceanic Steam Nav. Co. v. Aitken*, 196 U. S. 589, 49 L. Ed. 610, 25 Sup. Ct. Rep. 317 [see, also, Rose's U. S. Notes].) Whether errors of judgment will or will not make a physician liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession. (*West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107; *Kline v. Nicholson*, 151 Iowa, 710, 130 N. W. 722; *Wilkins' Admr. v. Brock*, 81 Vt. 332, 70 Atl. 572; *McQuay v. Eastwood*, 12 Ont. 402; *Kruger v. McCaughey*, 149 Ill. App. 440; *McAlinden v. St. Maries Hospital Assn.*, 28 Idaho, 657, Ann. Cas. 1918A, 380, 156 Pac. 115; *United States v. Divino*, 12 Philippine I. 175; 30 Cyc. 1578.) "Although a physician may have exercised a proper degree of skill and care in his treatment of a case, still if he fails to give the patient or his attendants proper instructions best calculated to effect a cure, he is guilty of negligence for which he may be held liable." (*Beck v. German Klinik*, 78 Iowa, 696, 7 L. R. A. 566, 43 N. W. 617; *Carpenter v. Blake*, 75 N. Y. 12; 30 Cyc. 1577.)

"A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient and the physician's opportunities for examination will permit." (*Burk v. Foster*, 114 Ky. 20, 1 Ann. Cas. 304, 59 L. R. A. 277, 69 S. W. 1096; *Stevenson v. Gelsthorpe*, 10 Mont. 563, 27 Pac. 404; 30 Cyc. 1575.) If there is reasonable opportunity for examination, and the nature of the injury or ailment can be discovered by the exercise of ordinary care and diligence, then a physician is answerable for failure to make such discovery. (*Manser v. Collins*, 69 Kan. 290, 76 Pac. 851; *Lewis v. Dwinell*, 84 Me. 497, 24 Atl. 945; *Quinn v. Donovan*, 85 Ill. 194; 30 Cyc. 1575.) So in this case it was just as proper to find out what appliances the defendants had at their

disposal as it was to ask them how many years they had been practicing or from what school they graduated.

In the case of *Viita v. Donlan*, 132 Minn. 128, 155 N. W. 1080, the supreme court of Minnesota laid down the rule that it was proper to ask questions relating to X-ray, even though there were no allegations of negligence relative to X-ray. (See, also, 30 Cyc. 1575, and *Burk v. Foster*, *supra*.)

The general rule adopted by the courts is that the opinions of expert witnesses are not, as a matter of law, to be accepted by the jury in place of their own judgment. (*Head v. Hargrave*, 105 U. S. 45, 26 L. Ed. 1028 [see, also, Rose's U. S. Notes].) Where the jury have before them all the facts upon which experts base their opinions, they are not conclusive, though they are entitled to respectful consideration. (*Commonwealth v. Moss*, 6 Kulp (Pa.), 31; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Leitensdorfer v. King*, 7 Colo. 436, 4 Pac. 37; *The Conqueror*, 166 U. S. 110, 41 L. Ed. 937, 17 Sup. Ct. Rep. 510 [see, also, Rose's U. S. Notes]; *People v. Barberi*, 12 N. Y. Cr. Rep. 89, 423, 47 N. Y. Supp. 168. See note to *Hull v. St. Louis*, 42 L. R. A. 753 [138 Mo. 618, 40 S. W. 89], where the matter is discussed at length.)

MR JUSTICE HURLY delivered the opinion of the court.

This is an action brought by the administrator of the estate of Edson Currier, deceased, for alleged malpractice growing out of the treatment of said Currier, following injuries which he had received in an accident.

Currier was employed by the Anaconda Copper Mining Company at the West Colusa mine in Silver Bow county on the twenty-ninth day of December, 1913, and for some time prior thereto, on which date he was injured, sustaining an impacted fracture of the right hip-joint or neck of the femur, accompanied with a dislocation of the hip-joint, while in the discharge of his duties. The Murray Hospital, under a contract between it and the mining company for the benefit of

its employees, was obliged to furnish surgical and medical care, treatment and attention to the employees of said mining company, for which service the employees, including Currier, had paid a stated sum per month during the time of their employment. After receiving the injuries referred to, and under the terms of said contract, Currier was taken to the hospital and placed under the care of the hospital and its physicians, among whom are the defendants above named. The evidence discloses that, after Currier was taken to the hospital, his hip was examined by its employees, who diagnosed his injury as a dislocation of the hip-joint. It is alleged in the complaint that the defendants treated his injuries as a dislocation for a period of about fifty days, during all of which time it is alleged that Currier was suffering from an impacted fracture of the hip-joint, rather than a dislocation, and that the defendants carelessly and negligently failed to treat the said fracture as such until about fifty days after Currier received the same, and carelessly and negligently failed to properly treat the said fracture at any time or at all. It is further alleged that the defendants at all times in the complaint mentioned had at their disposal an X-ray apparatus for making examinations, but that they carelessly, negligently and unskillfully failed to properly diagnose the said fracture by the means at their disposal, including said X-ray apparatus, and likewise failed to give to said hip the continued treatment which the same needed and required, and that by reason thereof Currier suffered great physical pain and mental anguish, and that an abscess developed on his hip, causing an infection which later caused his death.

At the close of the case defendants moved the court for a nonsuit upon the ground that the evidence was insufficient to justify a verdict in favor of plaintiff. The motion was granted as to defendant T. J. Murray but denied as to the remaining defendants. Plaintiff had verdict. From the judgment thereon, and from an order denying a motion for a new trial, the defendants appealed.

There was testimony on the part of the plaintiff that Currier, when brought to the hospital, was suffering from wounds upon his head and also from injuries to his hip; that, because of the severity of the shock sustained, it was deemed inadvisable to attempt to put him under an anesthetic just then. His head wounds were dressed, and provision was made for keeping the patient at rest until the shock condition had subsided. Upon the following day the patient was removed to the operating-room, placed under an anesthetic, and his head wounds further dressed and cared for. The physicians in charge examined the injury to the hip, and testified that all the conditions were typical of an ordinary posterior dislocation. There is given in considerable detail the steps taken by them in handling, reducing and treating the dislocation; that measurements were taken of Currier's limbs; that no shortening of the limb existed, *etc.*; that the leg was firm and rigid; that no evidence of a fracture was discovered by them; and that there was nothing to indicate such fracture. The patient was then removed to his room. On the thirteenth day the physicians in charge told the nurse to have the patient sit up in bed, and with the aid of pillows and other supports he was propped up in bed, and this was done each day following. Later one of the physicians (Dr. Blake) told Currier he should get up and move around on crutches. Dr. Blake brought him crutches, and, with the assistance of the doctor and of Mrs. Currier and a nurse, he got out of bed. Mrs. Currier testified that he was directed by the doctor to place his foot upon the floor and put his weight thereon and to walk around on the crutches, which he did thereafter every day, spending part of the time each day in a wheeled chair, until he was later operated upon. The testimony of Mrs. Currier as to the first occasion when he used the crutches is that this occurred about the twenty-second or twenty-third day after he came to the hospital. There is also testimony by Mrs. Currier that deceased complained of intense pain when propped up in bed and in getting out of bed and moving

around. On the thirty-sixth day an X-ray picture of the hip was taken, which disclosed that Currier had an impacted fracture of the neck of the femur. After the discovery of this fracture no change was made in the treatment, and Currier continued to get up and move around the room at the request of the doctor in charge. On or about the fifty-second day, his leg being then swollen, he was taken to the operating-room, and an incision made in his perineum, in which was found a considerable quantity of pus. Upon the following day another operation was performed and more pus removed. Mrs. Currier testified that at the time one of the physicians conducting the operation said, "That is where the trouble is coming from." Some time thereafter (as testified by Mrs. Currier, about two to two and one-half weeks) the doctors opened the incision and then found that the bone was honey-combed and broken, when the physicians cut away the decayed portions. She testified that one of the operators then said, "That was the seat of the trouble." No splints or supports were placed upon the hip at any time, though the wounds caused by the operation were dressed and bandaged. On or about the eighty-fourth day Currier died, concededly from septic poisoning.

It is conceded by practically all of the physicians, whether testifying for the plaintiff or the defendants, that an impacted fracture of the neck of the femur presents unusual difficulties in treatment and diagnosis, and that such an injury is of a very serious nature to the patient.

There is also testimony to the effect that Currier was suffering from stricture of the urethra. One of the physicians testified that Currier, shortly after coming to the hospital, informed him that he was suffering from the effects of gonorrhea, contracted some considerable time previously, and that he did not want the fact disclosed to his wife, and that it was not made known to her. For some days, to permit urination, he was catheterized. After his death an autopsy was held, when, in addition to the impacted fracture, the

honeycombed condition of the bone, and a purulent condition in the hip, a slight amount of pus was found in the pole of the right kidney, about a dram in quantity. Otherwise his internal organs were found to be normal.

It is contended by the defendants that the septic condition which caused his death was because of the gonorrhea and stricture, and that, when injured by the accident, the germs passed through the lymphatic system and found lodgment in the hip, the spot of weakest resistance in his system, and that the purulent condition of the hip was in no wise caused by lack of care, nor could it have been prevented by the exercise of care and treatment. There is testimony as to the treatment given him for the stricture. Mrs. Currier denies that he suffered from gonorrhea, and testified that for about eighteen years prior to the accident she had been his wife, during which time they had sustained the usual relations of husband and wife, and that she had never contracted the disease. There is also medical testimony that, had he suffered from gonorrhea, she would have been likely to contract the same. Special interrogatories were submitted to the jury as to whether Currier was suffering from stricture or gonorrhea, and as to whether the septic condition was caused by such afflictions. Upon these the jury found in the negative.

Appellants' first specification is based upon the court's [1] statement of the issues in its instructions to the jury. We think the statement was sufficient. However, had defendants desired a more complete instruction, it was their duty to tender one.

Plaintiff's counsel, in examining physicians testifying in his [2] behalf, in framing certain questions, included therein statements from text-books on medical subjects. This was objected to by defendants, and they now contend that such rulings constituted reversible error.

Experts are permitted to give their conclusions because of their presumed knowledge of subjects with which the ordinary layman or juror is not conversant. These opinions may be

the result of their actual experience, or because of theoretical knowledge based upon special study of the subject. The testimony given by them is necessarily in the nature of a conclusion in most instances, and likewise is largely in the nature of hearsay. For a witness whose fitness is thus determined to be permitted upon his direct examination to merely state that he agrees with the text of a certain writer is in effect to permit the reception in evidence not only of the expert's opinion, but likewise to permit the unsworn statement of another to go to the jury without opportunity for cross-examination. It is permissible, and perhaps necessary and advisable in most instances, for the expert to state his experience, knowledge and other qualifications, even stating the source of his knowledge; but we are not inclined to extend the rule to permit the introduction of statements of text-writers upon medical subjects as part of the direct evidence. There is a clear distinction between so doing, and the rule announced by this court in *Emerson v. Butte Electric Ry. Co.*, 46 Mont. 454, 129 Pac. 319, and *State v. Penna*, 35 Mont. 535, 90 Pac. 787. (See 2 Encyclopedia of Evidence, 589 *et seq.*; *City of Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 678; *In re Mason*, 60 Hun, 46, 14 N. Y. Supp. 434; *Pahl v. Troy City Ry. Co.*, 81 App. Div. 308, 81 N. Y. Supp. 46; *Elliott v. Ferguson*, 37 Tex. Civ. App. 40, 83 S. W. 56.)

Error is also assigned because plaintiff's counsel was [3-5] permitted to inquire of witnesses whether, if an X-ray had been taken of the injured limb when Currier was brought to the hospital, the fracture would have been discovered, and also to the refusal of the court to instruct the jury as follows: "You are instructed that you cannot consider any of the testimony in this case with reference to the failure of the defendants to take an X-ray picture of the hip of the deceased unless from the evidence you find that the plaintiff has proved by a preponderance of the evidence that it was usual and customary under like circumstances to take an X-ray photograph, and that ordinarily skillful and careful physicians and

surgeons under similar circumstances would have done so. Proof of the failure of the defendants to take an X-ray photograph of the hip of the deceased by itself is not evidence of negligence on their part."

Currier was entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient and the physician's opportunities for examination permitted and demanded. (30 Cyc. 1575; *Burk v. Foster*, 114 Ky. 20, Ann. Cas. 304, 59 L. R. A. 277, 69 S. W. 1096.) In *Stevenson v. Gelsthorpe*, 10 Mont. 563, 27 Pac. 404, this court said: "The physician is under an implied obligation, when he undertakes to treat diseases or injuries, to bring to his aid such obtainable remedies and appliances as discovery and experience have found to be the most appropriate and beneficial in aiding recovery. But in some cases the best and most appropriate appliances or remedies may be very simple and commonplace, and it may be the highest type of skill which applies these simple things to aid nature in its healing processes."

It is undisputed that defendants did not use the X-ray until the thirty-sixth day. The physicians in effect say they had no reason to suspect the existence of the fracture, and that, even if they had discovered it earlier, there would have been no change in the treatment under the conditions existing, and it conclusively appears that there was no change in treatment prior to the discovery of symptoms indicating pus. Plaintiff's experts were asked if the failure to use the X-ray under the conditions was want of care. To this question Dr. Sullivan answered: "If, assuming that a man had an injury to the hip, and having an X-ray machine at my disposal *if I had any doubt whatever as to the condition existing*, I would use the X-ray." Again, in answer to a hypothetical question, he testified: "Well, I would say in a condition of that kind, *if the physician had any doubt as to the diagnosis*, why I say they didn't use the means that ordinarily are used, having an X-ray to find out what the diagnosis was. But the question does not presuppose whether or not there was any

question as to the diagnosis of the condition; *if there was any doubt as to the injury*, why, then, they should have used the X-ray machine, having one at their disposal, in my opinion, at that time." Once more he testified: "Well, assuming all those facts as you stated, and that these two conditions did exist, and that only one of them was found, I would say that, using ordinary care, it should have been used, *if there was any doubt as to the diagnosis*." Later he said: "Well, if the question was asked to know whether or not under those conditions I would have used the X-ray, having one at my disposal, why, I would always use one in my own personal practice; I would always use it under a condition of that kind where I had one at my disposal, where an injury to the hip; even if I was positive of the condition, I would use it to satisfy myself. *Of course, other doctors might not do so, but that is simply my treatment*."

Dr. Matthews, another witness for plaintiff, testified: "Personally I absolutely refuse to treat fractures without an X-ray picture." He also testified: "As to the use of the X-ray machine in cases of impaction in Butte, in December, 1913, and the early months of 1914, I know what my practice in the use of it was; I don't know the general practice."

Deceased was entitled to a careful examination. Whether the conditions surrounding the patient demanded the use of the X-ray was a question for the jury. An examination with the aid of the X-ray would have disclosed the fracture. The testimony was elicited with the evident intent of showing that the failure to use the X-ray was want of care, and to show that Currier was not given a proper examination. In view of the answers of the experts, as given above, as to the circumstances under which they use the X-ray, the defendants were entitled to the benefit of the instruction. Whether or not the physicians were guilty of failure to use reasonable care and diligence in discovering the extent of Currier's injuries was necessarily involved in the question as to whether he received proper treatment and examination. The only

positive testimony as to negligence or want of care because of the failure to use the X-ray was as given above. The instruction was applicable to the evidence and embraced correct principles of law.

The answers of Dr. Sullivan and Dr. Matthews do not disclose the necessity of the use of the X-ray except in case of doubt, and Dr. Matthews merely says that he uses it in his own practice in all cases, but does not know the practice of others in that regard. Such testimony does not prove negligence nor want of care or skill. Under any conditions, whether or not failure to use the X-ray to determine the nature and extent of Currier's injuries was a question to be decided by the jury and the instruction should have been given. (*Viita v. Donlan*, 132 Minn. 128, 155 N. W. 1080; *Stevenson v. Yates*, 183 Ky. 196, 208 S. W. 820. See, also, *Wojciechowshi v. Coryell* (Mo.), 217 S. W. 638.)

Appellants urge objection to instruction No. 18 upon [6] grounds not contained in those made at the settlement of the instructions, and we therefore disregard the same.

Appellants tendered an instruction to the effect that if [7] Currier, by refusing to adopt the remedies or to comply with directions of the defendants, proximately contributed to his death, there should be no recovery by the plaintiff. The court refused to give the instructions. There was no plea of contributory negligence, and there is only evidence indicating some slight petulance on the part of the patient in refusing treatment by Dr. Schwartz on one occasion, which the doctor later testified would not have changed the result. On the evening Currier was brought to the hospital he objected to having anything done to his hip. The physicians testified that because of his condition they did not feel it wise to attempt to adjust the hip before the next day. There was therefore nothing to justify the giving of the instruction.

Appellants requested the court to instruct the jury: "No. 39. The court instructs the jury that the question as to whether [8, 9] or not the defendants in treating the injury of which

Edson Currier complained used that degree of reasonable and ordinary care and skill used by physicians and surgeons engaged in the same line of practice in similar localities is a question to be determined from the expert testimony of physicians and surgeons, and the jury must base its findings as to such question upon the testimony submitted by the physicians and surgeons as expert witnesses herein relative thereto."

Also:

"No. 46. You are instructed that expert evidence is entitled to importance only when fairly given by one properly accredited through his experience and study in the particular science upon an hypothesis which is true in the relation of its parts to the whole case, which is the subject of inquiry; that is to say, the value of the opinion of an expert witness depends upon the knowledge, learning, and experience of the expert and upon the facts upon which it is based. Therefore in this case, if you find that the opinions expressed by any expert testifying herein were given in answer to hypothetical questions which were incomplete in the presentation of the material facts as shown by the evidence, you are at liberty to give the testimony of such expert only such weight as you believe it may be entitled to in view of all of the established facts in the case."

In *Miller v. Toles*, 183 Mich. 252, L. R. A. 1915C, 595, 150 N. W. 118, it is said: "It appears to be the contention of the plaintiff that, having laid before the jury the facts surrounding the injury, the subsequent treatment, and the ultimate loss of the limb, the jury, in the absence of all testimony of an expert character tending to show malpractice, should be permitted to draw inferences of negligent conduct on the part of defendant. We have had occasion, very recently, to pass upon this identical question. In the case of *Farrell v. Haze*, 157 Mich. 374, 122 N. W. 197, the following request to charge was submitted on behalf of the defendant: 'The question whether the loss of the plaintiff's foot was attributable to anything that the plaintiff claims the defendant did or omitted

to do is a scientific question, which the jury cannot determine for itself, and can only be answered by an expert; and, inasmuch as no expert or medical man or surgeon has stated that the loss of the foot, in his opinion, came from anything the defendant did or omitted to do, therefore I charge you that you cannot take the loss of the foot into consideration in this case or hold the defendant liable therefor.' We held, at page 392 of 157 Mich., at page 197 of 122 N. W., that the proffered request should have been given. Upon the same point see, also, *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597; *Mayo v. Wright*, 63 Mich. 32, 29 N. W. 832; *Spaulding v. Bliss*, 83 Mich. 311, 47 N. W. 210; and *Neifert v. Hasley*, 149 Mich. 232, 112 N. W. 705." In the above case, however, it is apparent that there was a total lack of expert testimony.

In *Ewing v. Goode* (C. C.), 78 Fed. 442, in the federal circuit court of Ohio, Taft, Judge, said: "In many cases expert evidence, though all tending one way, is not conclusive upon the court and jury, but the latter, as men of affairs, may draw their own inferences from the facts, and accept or reject the statements of experts; but such cases are where the subject of discussion is on the border line between the domain of general and expert knowledge, as, for instance, where the value of land is involved, or where the value of professional services is in dispute. There the mode of reaching conclusions from the facts when stated is not so different from the inferences of common knowledge that expert testimony can be anything more than a mere guide. But when a case concerns the highly specialized art of treating an eye for cataract, or for the mysterious and dread disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury. Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough

to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence did cause the injury. When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither. (*Louisville & N. R. Co. v. East Tennessee, V. & D. Ry. Co.*, 60 Fed. 993, 22 U. S. App. 102, 114, 9 C. C. A. 314; *Ellis v. Railway Co.*, L. R. 9 C. P. 551.)” See, also, *Hull v. City of St. Louis*, 138 Mo. 618, 42 L. R. A. 753, 40 S. W. 89, in which latter report is a very exhaustive note upon the subject.

The supreme court of Iowa, in discussing the subject, said: “These questions are to be determined, of course, in the light of expert evidence as to what a reasonably judicious and careful physician would do under like circumstances; but it was for the jury to say whether, in the light of the expert evidence, the plaintiff did exercise the care, skill and judgment required. [Citing authorities.]” (*Kline v. Nicholson*, 151 Iowa, 710, 130 N. W. 722.)

In the earlier case of *Ball v. Skinner*, 134 Iowa, 298, 111 N. W. 1022, the same court held: “A study of the precedents will develop some confusion in the statement of rules governing the weight and effect to be given expert testimony; but the reasonable rule, applicable at least to the great majority of cases, would seem to be that expert testimony is to be given consideration like all other testimony which the court allows to go to the jury, and accorded such weight as, in view of all the evidence of every kind and nature and its reasonableness and the apparent candor and competency of the witnesses, in fairness demand. (See note to *Hull v. St. Louis*, 42 L. R. A. 753 (138 Mo. 618, 40 S. W. 89.) All this is but another way of stating the elementary doctrine that the jury is to give the evidence, and all of it, full and fair consideration, and therefrom draw the conclusion which the judgments and consciences of the jurors approve as just and right.”

The case of *Sheldon v. Wright*, 80 Vt. 208, 67 Atl. 807, dealt with a request for instructions somewhat similar to instruction No. 39, quoted above. In discussing the same the court said: "By several requests the defendant asked the court to charge, in substance, that in passing on the treatment he had given the plaintiff's leg the jury must consider only the expert evidence, the defendant's own testimony, and whatever admissions or declarations he had made. These requests were refused, and rightly. In determining the facts about the previous condition of the leg, about the injury, and about the operation and the subsequent treatment, the testimony of various nonexpert witnesses was for consideration, as well as the testimony and admissions of the defendant. The plaintiff himself appears to have testified to a great variety of facts relevant to the treatment. The form of these requests was varied, but all were fallacious. The expert testimony would have been of no concrete value without a determination of facts which were to be determined by a consideration of every piece of relevant evidence, whatever its source."

Judging from the text of the decision *supra*, the instruction there condemned is more comprehensive than No. 39, above. The refused instruction would limit the jury in its consideration of the case not only to the opinion of the experts as to what is the proper standard in the matter of care and treatment, but also to their opinion, and theirs only, as to whether or not the defendants actually rendered the care and attention necessary and proper, and would in effect direct the jury to disregard all facts detailed by lay witnesses concerning conditions upon which their testimony was relevant and material. There can be no question that recovery could not be had without expert testimony supporting the charge of malpractice, and the cases cited above are in accord with the great weight of authority. This court has previously expressed such views in *Stevenson v. Gelsthorpe*, *supra*, as follows: "It was reserved to those witnesses, learned in the science of medicine

and surgery, and experienced in the treatment of such cases, to give the necessary evidence as to whether the treatment described was proper and skillful or negligent and unskillful, and whether good or injurious results flowed therefrom." With that statement we agree; but to give an instruction in the language of proposed No. 39, we feel, takes from the jury, as indicated above, consideration of evidence necessary to a determination of the issues. Of course, in the absence of expert testimony in behalf of the plaintiff in a malpractice case, the court is not justified in submitting the same to the jury. But, when competent expert evidence has been received, it is to be considered by the jury only as other evidence in the case.

Proposed instruction No. 46 should, upon request, have been given. It is in accord with the rules pertaining to expert testimony and answers to hypothetical questions. This court has said: "It was for the jury to say, after considering all the evidence introduced on both sides, whether the facts, thus assumed as established for the time being, were really established, and whether the opinion of the witness was worthy of consideration. (Lawson on Expert Evidence, 152, 153; 1 Thompson on Trials, secs. 607-610, and cases cited.)" (*State v. Crowe*, 39 Mont. 174, 102 Pac. 579.)

Defendants tendered an instruction directing the jury to [10] disregard certain statements made by the witness Tyler upon cross-examination, which the court refused to give. These statements were developed by defendants' counsel and were responsive to questions asked the witness. No motion was made to strike them out, and probably such motion would not have been sustained if made. Appellants, having brought forth this evidence in a colloquy with the witness upon a matter not touched upon in the direct examination, are in no position to complain because the court refused to strike it out.

The court also refused to give instruction No. 45, tendered by defendants, as follows:

“The court instructs the jury that a physician or surgeon [11, 12] is not bound to use any particular method of treatment, and if among physicians and surgeons of ordinary skill and learning more than one method of treatment is recognized as proper, it is not negligence for the defendants to adopt either of such methods; and the fact that some other method of treatment existed, or some other physician or surgeon testified in this case that he might or would have used or advised the other or different method, does not even tend to establish negligence or improper examination or treatment on the part of the defendants; nor would it be an act of negligence or impropriety for the defendants not to have adopted such method, so testified to by such other physician or surgeon herein.”

As to whether error of judgment upon the part of a physician resulting in an incorrect diagnosis of the disease or injury from which his patient is suffering renders him liable is a question which has been frequently passed upon by the courts. In *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107, the court said: “Whether errors of judgment will or will not make a surgeon liable in a given case depends, not merely upon the fact that he may be ordinarily skillful as such, but whether he has treated the case skillfully or has exercised in its treatment such reasonable skill and diligence as is ordinarily exercised in his profession. For there may be responsibility where there is no neglect, if the error of judgment be so gross as to be inconsistent with the use of that degree of skill that it is the duty of every surgeon to bring to the treatment of the case according to the standard indicated.” (See, also, *Hansen v. Pock*, 57 Mont. 51, 187 Pac. 282; *Dorris v. Warford*, 124 Ky. 768, 100 S. W. 312; 30 Cyc. 1578.)

Nor does the fact that other physicians might have adopted other methods necessarily render the attending physician liable, nor show negligence or want of skill or care. If the method adopted is one which has substantial medical support, it is sufficient. (*Cozine v. Moore*, 159 Iowa, 472, 141 N. W.

424; *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31; *Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Kline v. Nicholson*, 151 Iowa, 710, 130 N. W. 722.) And, where there is a difference of opinion among practical and skillful surgeons as to the practice to be pursued in certain cases, a physician may exercise his own best judgment, employing the methods his experience may have shown to be best, and mere error of judgment will not make him liable in damages, in the absence of a showing of want of care and skill. (*Van Hooser v. Berghoff*, 90 Mo. 487, 3 S. W. 72; *Ewing v. Goode*, *supra*; *English v. Free*, 205 Pa. 624, 55 Atl. 777; *De Long v. De Laney*, 206 Pa. 224, 55 Atl. 965; *Staloch v. Holm*, 100 Minn. 276, 9 L. R. A. (n. s.) 712, 111 N. W. 264.)

Nor is an incorrect diagnosis of itself sufficient to establish liability. The plaintiff must show that such mistake was due to failure to use ordinary care and diligence and to exercise reasonable learning, skill and judgment in his examination and treatment. (*Nickerson v. Garish*, 114 Me. 354, 96 Atl. 235; *Von Boskirk v. Pinto*, 99 Neb. 164, 155 N. W. 889; *Sims v. Parker*, 41 Ill. App. 284; *Willard v. Norcross*, 86 Vt. 426, 85 Atl. 904; *Staloch v. Holm*, *supra*; *Brydges v. Cunningham*, 69 Wash. 8, 124 Pac. 131.)

In *Hier v. Stites*, 91 Ohio St. 127, 110 N. E. 252, the court said: "In an action against a physician and surgeon for negligent treatment, * * * plaintiff must show that defendant's treatment either did something that physicians and surgeons of ordinary care, skill and diligence would not have done under like or similar conditions, or that defendant omitted to do some particular thing they would have done under like or similar conditions, and must further show that the injury * * * resulted from the neglect or omission shown."

The instruction should have been given.

Defendants contend that the plaintiff's evidence tends to [13] show, at most, error of judgment upon their part in

their diagnosis, and that there is no medical expert testimony showing lack of ordinarily reasonable care and skill, and that therefore the plaintiff failed to establish the case; and it is strenuously insisted that the evidence is insufficient to support the verdict. The transcript of the testimony consists of nearly 500 pages, and we will not attempt to set it forth in detail, particularly in view of the necessary reversal of the judgment and order upon other grounds. It is sufficient to say that, while the testimony of the physicians testifying in behalf of the plaintiff was in most instances not direct as to the alleged negligence and want of care or skill displayed by the defendants, Dr. Sullivan (plaintiff's witness) testified in answer to a hypothetical question that the septic condition of Currier was due to the honeycombed condition of the bone, and Dr. Matthews, also a witness for plaintiff, categorically testified that the treatment given, in his opinion, showed a lack of care. This, in our opinion, was sufficient to justify denial of the motion for nonsuit. (*Hanson v. Thelan* (N. D.), 173 N. W. 457; *Eicholz v. Poe* (Mo.), 217 S. W. 282; *McAlinden v. St. Maries Hosp. Assn.*, 28 Idaho, 657, Ann. Cas. 1918A, 380, 56 Pac. 115; *Adams v. Bunker Hill Min. Co.*, 12 Idaho, 650, 11 L. R. A. (n. s.) 844, 89 Pac. 624.)

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. JUSTICE MATTHEWS concurs.

MR. CHIEF JUSTICE BRANTLY: I concur in the reversal of the judgment for the reasons stated by Mr. Justice HURLY in the majority opinion. I am of the opinion, however, that there was not sufficient evidence to require the submission of the case to the jury.

From the nature of this class of cases, as abundantly appears from the authorities cited in the original opinion, there must be some expert testimony tending to show that the

diagnosis made and course of treatment adopted by the attending physician were negligent and unskillful, and also that they were the proximate cause of the injury or death which is the basis of the action. The excerpts quoted from the testimony of Drs. Sullivan and Matthews—and these constituted all the evidence on the subject—not only do not tend to show that the defendants were guilty of negligence in failing to use the X-ray machine in making their diagnosis, but do not tend in any way to establish that this failure resulted in the death of Currier. On the contrary, the testimony of defendants' witnesses, which was not contradicted, was that, even if the X-ray machine had been used and the impacted fracture discovered, the course of treatment adopted from the first should have been the same. Besides, no expert witness expressed the opinion that the course of treatment adopted caused the septic condition which resulted in Currier's death. For these reasons, I think the court should have granted a nonsuit as to all of the defendants.

MR. JUSTICE HOLLOWAY: I concur in the order of reversal, but not in all that is said in its support. In my judgment, the evidence is insufficient to justify the submission of the case to the jury.

**ECCLESINE, RESPONDENT, v. GREAT NORTHERN RY. CO.,
APPELLANT.**

(No. 4,215.)

(Submitted September 25, 1920. Decided November 15, 1920.)

[194 Pac. 143.]

*Railroads—Personal Injuries—Master and Servant—Complaint
—Insufficiency—Negligence—Appeal and Error—Complaint
Deemed Amended—Rule—Inapplicability—Trial—Demurrer
—Submission Without Argument.*

**Railroads—Personal Injuries—Master and Servant—Complaint—Absence
of Essential Allegation—Insufficiency.**

1. The complaint in an action for personal injuries against a railway company which did not allege that plaintiff was employed by the defendant at the time of the injury did not state a cause of action under the federal or state Employers' Liability Acts, nor, if he was an employee or a passenger, under the federal Safety Appliance Act, nor upon the theory that the action was the ordinary one for damages for personal injuries resulting from negligence.

Personal Injuries—Negligence—Complaint—Contents.

2. To state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, its breach, the resulting damages and that the breach of duty was a proximate cause of the injury.

[Sufficiency of averments of negligence of carrier causing injury to passenger, see notes in 13 L. R. A. (n. s.) 602; 29 L. R. A. (n. s.) 809; L. R. A. 1918C, 366.]

**Appeal and Error—Complaint—Deemed Amended to Admit Proof—When
Rule not Applicable.**

3. The rule that where evidence was introduced at the trial of a cause without objection the complaint will, on appeal, be deemed amended to admit the evidence if necessary to sustain the judgment, applies only to a case in which the objection to the sufficiency of the complaint is raised for the first time in the supreme court, and not to one where the complaint had been attacked by general demurrer and an exception saved to an adverse ruling.

Same—Trial—Complaint—Challenging Sufficiency—Effect of Exception.

4. Where defendant challenges the sufficiency of the complaint by demurrer, or by objection to the introduction of evidence, his exception once saved to an adverse ruling is saved for all purposes during the proceedings in the case, and failure to repeat the objection thereafter when the same question is raised does not constitute a waiver.

Trial—Demurrer—Argument not Necessary, When.

5. In the absence of a request by the court therefor, counsel is not required to support with argument his objection to the sufficiency of the complaint raised by filing a general demurrer.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Thomas C. Ecclesine against the Great Northern Railway Company. Defendant appeals from a judgment for plaintiff and from an order denying it a new trial. Reversed and remanded.

Messrs. Veazey & Veazey and Mr. H. C. Hopkins, for Appellant, submitted a brief; Mr. I. Parker Veazey, Jr., argued the cause orally.

The court committed error in overruling the demurrer to the complaint. The complaint was insufficient in that it did not charge the violation of any legal duty owing by the defendant to the plaintiff, because it did not show the right of the plaintiff to be on the car or that the relationship of master and servant existed between the plaintiff and the defendant, and, secondly, because its allegations of negligence were insufficient. As regards the first of these objections, the complaint nowhere alleges that the plaintiff was in the employ of the defendant. Such an allegation is necessary, without which the complaint is fatally defective. Thus, in 4 Labatt on Master and Servant, page 4950, it is said: "A complaint which fails to allege that the relationship of master and servant existed between the defendant and the plaintiff fails to state a cause of action." (*Walton v. Lindsey Lbr. Co.*, 145 Ala. 661, 39 South. 670; *Sargent Co. v. Baublis*, 215 Ill. 428, 74 N. E. 455; *Walker v. El Paso Elec. Ry. Co.* (Tex. Civ.), 118 S. W. 554; *Fusselman v. Yellowstone etc. Irr. Co.*, 53 Mont. 254, Ann. Cas. 1918B, 420, 163 Pac. 473.)

Messrs. Wheeler & Melzner and Mr. H. L. Maury, for Respondent, submitted a brief; Mr. Maury and Mr. Albert A. Grorud, of Counsel, argued the cause orally.

We might well grant it was error in the court to overrule the demurrer to the complaint. The question is not before

the court. This court indulges in no charity toward a party which submits its general demurrer without argument to a busy trial judge. Now, the settled practice in this state in accordance with four principles of law, announced previous to the happening of Ecclesine's injury, is: "It is well settled by the decisions of this court (1) that the sufficiency of a complaint may be questioned for the first time on appeal, and that, if found fatally defective, a judgment rendered thereon for the plaintiff will be reversed. (*Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310; *Tracy v. Harmon*, 17 Mont. 465, 43 Pac. 500; *Shober v. Blackford*, 46 Mont. 194, 127 Pac. 329; *Cole v. Helena L. & Ry. Co.*, 49 Mont. 443, 143 Pac. 974.) These cases merely give force to the rule declared by the statute (Rev. Codes, sec. 6539), that a failure, to question the sufficiency of a complaint by demurrer in the trial court does not amount to a waiver of the right to question it thereafter. When, however, the point is made in this court for the first time on appeal, the objection is regarded with disfavor, and every reasonable deduction will be drawn from the facts stated in order to uphold the pleading. (2) So, also will the pleading be held sufficient if the defect made the basis of the objection is not a matter going to the root of the cause of action, but is such as might have been remedied by an amendment. Again, though it be (3) deficient, in its omission to state a particular fact necessary to make out a cause of action, it will be deemed amended by the answer when the latter contains allegations which supply the omission (*Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46), or assumes that the complaint contains the allegations in question. (*Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189.) And when a (4) trial has been had upon the evidence which has been introduced without objection, a judgment for plaintiff will not be reversed for a defective complaint, but the complaint will be regarded as having been amended in the trial court,

if this is necessary to sustain the judgment. (*Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071.)'' (*Ellinghouse v. Ajax L. Co.*, 51 Mont. 275, 281, L. R. A. 1916D, 836, 152 Pac. 481.) Error which the trial court may have made or may not have made is not to be considered, for it has been waived by the defendant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff recovered judgment for damages for personal injuries, and defendant appealed therefrom and from an order denying a new trial.

A general demurrer was interposed to the complaint but [1] overruled by the trial court, and error is predicated upon the ruling. The specific objection urged is that the complaint fails to allege that plaintiff was employed by the defendant at the time he received his injuries, or at all. It is not alleged that he was a passenger upon the defendant's train; neither can any fair inference be drawn from the pleading that plaintiff and defendant sustained any particular relationship whatever one to the other. The complaint cannot be sustained.

(1) It is fatally defective if the action be treated as one arising under the federal Employers' Liability Act. (35 Stats. at Large, 65.) That Act extends its provisions only to an employee of a common carrier by railway engaged in interstate commerce and to no other person or class of persons. (*Robinson v. Baltimore & O. R. Co.*, 237 U. S. 84, 59 L. Ed. 849, 35 Sup. Ct. Rep. 491 [see, also, Rose's U. S. Notes].) To make out a case under that statute, it is indispensable that the complaint disclose by an appropriate allegation that at the time of the accident the injured party was employed by the defendant. (2 Roberts on Federal Liability of Carriers, sec. 682.)

(2) The same rule applies if the action be considered as one arising under our state Employers' Liability Act (Laws

1911, Chap. 29), for our statute is in all substantial particulars a copy of the federal Act. (*Cornell v. Great Northern Ry. Co.*, 57 Mont. 177, 187 Pac. 902.)

(3) If it was the intention of plaintiff to invoke the provision of the federal Safety Appliance Act (27 Stats. at Large, 531, as amended, 32 Stats. at Large, 943, and supplemented, 36 Stats. at Large, 298), the complaint is equally defective. In enacting the original statute above, the congressional purpose was clearly defined and declared in the title: "To promote the Safety of Employees and Travelers upon Railroads," and the term "travelers" refers to passengers. (*Illinois Central R. R. Co. v. Williams*, 242 U. S. 462, 61 L. Ed. 437, 37 Sup. Ct. Rep. 128.) These two classes of persons, and only these, are comprehended by the Act, and neither the amendment nor the supplement enlarges the scope in this respect. Whether these Acts by necessary implication provide a remedy at the instance of a private individual belonging to either of the classes mentioned, or merely give recognition to a right arising under the rules of the common law, is not material here. The state courts are given concurrent jurisdiction in civil actions arising under these statutes, and matters of pleading and practice are governed by the local laws. (2 Roberts on Federal Liability of Carriers, sec. 878.) If it can be said that this is a statutory action arising under the Safety Appliance Act, as appears to be indicated in *Texas & Pac. Ry. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, 36 Sup. Ct. Rep. 482 [see, also, Rose's U. S. Notes], it is indispensable that, by appropriate pleading, plaintiff shall bring himself within one of the two classes for whose benefit the statute was enacted. This is the rule now too firmly established in this jurisdiction to admit of controversy. (*Kelly v. Northern Pac. Ry. Co.*, 35 Mont. 243, 88 Pac. 1009; *Daily v. Marshall*, 47 Mont. 377, 133 Pac. 681.)

(4) Neither can this complaint be sustained upon the theory that this is the ordinary action for damages for personal injuries resulting from negligence. Actionable

negligence arises only from a breach of legal duty, and to state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, the breach, the resulting damages and that the breach of duty was a proximate cause of the injury. (*Fusselman v. Yellowstone Valley etc. Irr. Co.*, 53 Mont. 254, Ann. Cas. 1918B, 420, 163 Pac. 473.)

Because this complaint fails to disclose that defendant owed to plaintiff any legal duty, it fails to state a cause of action.

(5) Counsel for respondent attempt to invoke the rule [3, 4] that whenever a cause has been tried and evidence introduced without objection, the complaint will be deemed to have been amended to admit the evidence, if this is necessary to sustain the judgment; but that rule has no application here. It applies only to a case in which the objection to the sufficiency of the complaint is raised in the supreme court for the first time, and the reason for the rule is obvious. The sufficiency of the complaint may be tested by demurrer or by objection to the introduction of evidence. In either event, the adverse ruling is excepted to and the exception once saved is saved for all purposes. (*Ferrat v. Adamson*, 53 Mont. 172, 163 Pac. 112.) The practice of law would become a farce if the rule were established that a party who has once saved a point by timely objection and exception to the ruling must repeat the objection thereafter every time the question is raised during the proceedings in the case, under penalty of having his exception deemed waived. Neither common sense nor any recognized rule of law sanctions such practice. The courts, including this one, may not have observed the distinction above on all proper occasions, but the error in failing to do so has not been repeated so often as to give rise to the application of the maxim, "*communis error facit jus.*" It is not necessary to refer to the observations of this court and other courts upon an objection to the sufficiency of a pleading raised in the appellate court for the first time, for this is not that case.

It is suggested that the demurrer was submitted to the lower [5] court without argument, but it is not rendered less effective for that reason. We know of no rule of law which requires counsel to support his objection with argument. Doubtless, if the trial court had considered argument necessary, it would have been requested; but in the absence of anything to indicate the contrary, it must be presumed that the ruling upon the demurrer was made deliberately even though it was erroneous. This case does not present any question of express waiver or aided by subsequent pleading.

The other assignments need not be considered, for if the complaint is amended, different issues may be presented. The complaint does not state a cause of action and will not support the judgment.

The judgment and order are reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

Rehearing denied December 18, 1920.

GRIGGS, RESPONDENT, v. GLASS, CLERK OF DISTRICT COURT,
ET AL., APPELLANTS.

(No. 4,178.)

(Submitted September 20, 1920. Decided November 15, 1920.)

[193 Pac. 564.]

County Officers — Proceedings for Removal — Costs — Witness Fees—Liability of County.

1. *Held*, that, in a proceeding brought by the attorney general under section 9006, Revised Codes as amended (Laws 1917, Chap. 25), for the removal of a county officer, the petition in which showed on its face that he acted in the name and in behalf of the state, which proceeding, however, resulted in favor of the accused, the

county, and not the attorney general personally, was liable for the payment of witnesses, and that the district court erred in granting an injunction restraining the payment of their fees.

(MR. JUSTICE HOLLOWAY dissenting.)

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

SUIT by Victor R. Griggs, County Attorney of Hill County, against George W. Glass, clerk of the District Court of the Eighteenth Judicial District, in and for the county of Hill, and another. From an order granting a permanent injunction, defendants appeal. Reversed, with directions to dismiss.

Cause submitted on briefs of Counsel.

Mr. S. C. Ford, Attorney General, *Mr. Frank Woody* and *Mr. A. A. Grorud*, Assistant Attorneys General, for Appellants.

Mr. Victor R. Griggs, Respondent, *pro se*.

Does section 9006 confer upon the state, acting through the attorney general, or upon the attorney general any authority to institute a proceeding under section 9006? It is our contention that it does not, and that whether designated by the name "complaining witness," "prosecuting witness" or "plaintiff," the person who instigated the case in question is S. C. Ford and not the state of Montana or S. C. Ford, attorney general for the state of Montana. It is very evident from the reading of section 9006 as amended that it not only contemplates that an ouster proceeding should be brought by a private individual, and not by the state, but that such a proceeding cannot in any event be brought by the state of Montana, and must be instituted by a private individual. In construing any statute, the whole must be taken together, and taking together the provisions that the accusation must be verified by the oath of some "person," that if the charge is not sustained, the costs may be charged against the complaining witness, and that whether taxed

against the defendant or the complaining witness, the costs must be taxed as in civil actions, we cannot escape the conclusion that an ouster proceeding must be instituted by a private individual.

It is very evident that the object of the provision relative to costs being assessed against the complaining witness is for the protection of the defendant. And who is the complaining witness? There is only one answer to this question. He is the "person" who verifies the accusation.

In no event could the state of Montana, or S. C. Ford, as attorney general for the state of Montana, or the state of Montana, through S. C. Ford, as attorney general for the state of Montana, verify the accusation, because they are not included in the term "person" under our statutes. In the absence of a statutory provision to that effect, the state is not included in the word "person" where used in the statutes. (*Butler v. Merritt*, 113 Ga. 238, 38 S. E. 751; *McBride v. Board of Commissioners*, 44 Fed. 17; *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192, [see, also, Rose's U. S. Notes]; *West Coast Mfg. & Inv. Co. v. West Coast Improvement Co.*, 25 Wash. 627, 62 L. R. A. 763, 66 Pac. 97; *Banton v. Griswold*, 95 Me. 445, 50 Atl. 89; *United States v. Baltimore & Ohio Ry. Co.*, 84 U. S. 322, 21 L. Ed. 597 [see, also, Rose's U. S. Notes]; *State v. Broun*, 10 Ark. 104; *State v. Harman*, 57 W. Va. 447, 50 S. E. 828; *Attorney General v. Sullivan*, 163 Mass. 446, 28 L. R. A. 455, 40 N. E. 843.)

That the law contemplates that the action should be brought, not by the state, but by a private individual is clearly set forth in the case of *State ex rel. Payne v. District Court*, 53 Mont. 350, 165 Pac. 294, where the court says: "The statute does not prescribe rules of pleading. It does contemplate that the accusation may be prepared by a layman." And again, on page 357 of 53 Mont., in speaking of the nature of the proceeding, the court said: "It is initiated by a private individual. It need not be in the name of the state * * *

and it is not a criminal action in the sense that the public prosecutor must conduct the proceedings.”

Whatever authority the attorney general might have for imposing the costs in question upon the state, or upon Hill county, must arise by statute, and we submit that there is no authority in our statutes for that officer imposing costs in an action of this kind, even though it be of a public nature, upon the state of Montana, much less upon the county of Hill. (See *People ex rel. Alderman v. Kirkpatrick*, 57 Cal. 353.)

MR. JUSTICE HURLY delivered the opinion of the court.

In July, 1917, petition was filed in the district court of Hill county in the name of “The State of Montana, on the Accusation of S. C. Ford, Attorney General for the State of Montana,” asking for removal of one of the officers of that county. Upon issues joined a trial was had, which resulted in dismissal of the proceeding, with judgment in favor of the defendant named therein.

Thereafter plaintiff, as county attorney of Hill county, filed [1] complaint alleging that without authority of law the clerk of said court would issue, and the county treasurer pay, warrants to witnesses who testified in said proceeding, and praying that they be enjoined from so doing. Upon the trial a permanent injunction was granted, in accordance with the prayer of the complaint, from which this appeal was taken by the defendants.

The contention of the plaintiff respondent is that neither under the provision of section 9006, Revised Codes, nor as amended by Chapter 25 of the Laws of 1917 is there any statute authorizing the payment by the county of witnesses subpoenaed to testify in proceedings arising thereunder. Section 3153 of the Revised Codes provides that the attorney general or any county attorney is authorized to cause witnesses to be subpoenaed, and to compel the attendance of witnesses in behalf of the county, or the state, without prepayment of fees. Under

section 3154 the clerk of the district court is directed to issue to any witness testifying in any civil action in behalf of the county or state a certificate of travel and attendance, the amount therein stated to be paid by the state or county treasurer. Section 3155 recites that the provisions of such sections shall extend to all actions and proceedings brought in the name of the attorney general, or any other person or persons, for the benefit of the state or county. Another section, 3183, provides that witnesses in criminal cases shall be paid, upon certificate issued by the clerk, from the general funds of the county.

By the provisions of section 7177, neither the state nor subdivision thereof, nor any officer prosecuting or defending an action on behalf thereof, is required to pay or deposit any fee or amount to or with any officer during the prosecution or defense of an action. The section further provides that no officer so prosecuting or defending shall be taxed with costs or damages, but such costs or damages shall be taxed to the state or county, as the case may be.

It is asserted that, because proceedings for removal of public officers need not be brought in the name of the state (*State ex rel. Payne v. District Court*, 53 Mont. 350, 165 Pac. 294), it follows that the attorney general in instituting such proceedings was not acting in behalf of the state or county, but was acting individually. In this view we cannot concur. The petition for removal indicates upon its face that the attorney general acted in the name and in behalf of the state. That he is not liable for the costs is apparent from a reading of the sections heretofore cited. Even if he acted under an erroneous theory as to the necessity of entitling the action in the name of the state, the statutory rule, as to payment of witnesses is not affected. The statutes *supra* do not penalize the attorney general or county attorney for mistakes of judgment. In *State ex rel. Loundagin v. Tattan*, 56 Mont. 211, 181 Pac. 984, Mr. Justice Holloway, speaking for the court, said: "We think it is reasonably clear that our Code

contemplates that, whenever a public officer sues or is being sued in his official capacity, he shall not be held personally responsible for the costs, but that the state or subdivision thereof represented by such official shall bear the burden. (Rev. Codes, sec. 7177.) It would appear that in this instance Judge Tattan represented Chouteau county—the county in which the proceeding arose—in the same sense that a state or county officer, when suing or being sued in his official capacity, represents the state or county, as the case may be, and that the costs of this proceeding constitute a proper charge against Chouteau county; but upon this we express no opinion. The only inquiry now before us is: Shall Judge Tattan be held personally liable? And this inquiry we answer in the negative.”

Clearly, a proceeding for the removal of a public officer is not a mere controversy between the petitioner and the officer accused. Whether it is *quasi* criminal or a mere special statutory proceeding is immaterial, as discussed in *State v. District Court, supra*, as is also the fact that it may be brought in the name of an individual, and not of the county or state.

In all its essentials it is a public proceeding ostensibly for the benefit of the public, to the end that we may have faithful public servants. The statute as amended provides a penalty in the discretion of the court for abuse of the right afforded by the statute in the case of proceedings unjustifiably instituted; but a similar penalty is likewise provided in other instances, as incident to prosecutions in criminal actions instituted without probable cause. In illustration see sections 9372, 9612 and 9613, Revised Codes.

The personnel of the officers of a county is a matter resting almost exclusively with the people of the county for whom they act, and in which the state in its sovereign capacity may be said to be only secondarily concerned. If the proceeding for removal had been brought under other sections of the statute, there could be no denial of the duty of the county to pay the witness fees, without obligation upon the part of

the state at large. We can see no difference in legal effect merely because the proceeding is brought under another section to accomplish the same purpose. In such a proceeding instituted by the attorney general, in which the county may be presumed to be vitally interested, and whose interests are affected, and in whose behalf the proceedings are in fact conducted, even if not nominally necessarily in its name or the name of the state, the authority granted the attorney general by virtue of the statutes cited is sufficient to bind the county to the payment of witnesses whose testimony may be necessary to a determination of the proceedings.

In the *Payne Case*, *supra*, no question concerning costs was involved, and nothing said therein is in conflict with the rule here announced.

The order appealed from is reversed, with directions to dismiss the action.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES MATTHEWS and COOPER concur.

MR. JUSTICE HOLLOWAY dissents.

STATE, RESPONDENT, v. TEUBNER, APPELLANT.

(No. 4,218.)

(Submitted September 25, 1920. Decided November 15, 1920.)

[193 Pac. 534.]

*Criminal Law—Gaming—Hearsay Testimony—Curing Error—
New Trial—Proper Denial.*

Gaming—Hearsay Testimony—Inadmissibility—Curing Error.

1. Error committed in permitting an officer to testify to a conversation had with one D., charged jointly with defendant for gambling but not on trial with him, relative to defendant's intention to open a gambling-room, without anything to show a conspiracy between defendant and D., *held* to have been cured by subsequent testi-

mony of D. that defendant had told him that he intended to open such a room.

Same—New Trial—Proper Denial.

2. Evidence *held* sufficient to justify the trial court's refusal to grant a retrial to defendant, convicted of the crime of gambling.

Appeal from District Court, Missoula County; Theo. Lentz, Judge.

FRANK TEUBNER was convicted of gambling, and appeals from the judgment and order denying his motion for new trial. Affirmed.

Cause submitted on briefs of Counsel.

Mr. Dan J. Heyfron, for Appellant.

The testimony of Arthur Higgins to the effect that Dumphy told him that he was going to put Teubner in charge of a game was entirely inadmissible as being pure hearsay. No conspiracy between Teubner and Dumphy had been shown, and therefore the evidence could not have been admitted on that ground. (*Root v. Davis*, 10 Mont. 228, 25 Pac. 105; Rev. Codes, sec. 7887, par. 6.) That this testimony materially affected defendant's rights is shown by the fact that without it there would have been insufficient evidence to go to the jury that defendant was "conducting" a gambling game, and under the information as filed, conducting had to be proved in order for the state to make out a case.

The state failed to prove that defendant "conducted" the game. This is not an information for playing the game but for conducting the game, and the information must be proved as alleged. (*Chambers v. State*, 77 Ala. 80; *Bell v. State*, 92 Ga. 49, 18 S. E. 186; *Patterson v. State*, 12 Tex. App. 222; 22 Cyc. 448.)

The state failed to prove that there was actual gambling of any kind. The evidence that men were playing cards and that they ran when officers broke into the room is insufficient to show that they were gambling. (*State v. Duncan*, 40 Mont. 531, 107 Pac. 510.) The officers who made the arrests could

not say that gambling was going on. The only evidence is that of the witness Hill, who said he gave a check to somebody. It was shown that the check had never been cashed. No evidence was introduced to show what became of the check, or that anyone bet, or anyone lost money. This was insufficient to show gambling. (*State v. Brooks*, 94 Mo. App. 57, 67 S. W. 942; *State v. Clein*, 154 Mo. App. 686, 136 S. W. 14; *Alvord v. Smith*, 63 Ind. 58; *Misner v. Knapp*, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65; *People v. Carroll*, 80 Cal. 157, 22 Pac. 129; 20 Cyc. 887, 888.)

Mr. S. C. Ford, Attorney General, and *Mr. Frank¹ Woody*, Assistant Attorney General, for Respondent.

MR. JUSTICE HURLY delivered the opinion of the court.

Defendant, convicted of gambling, has appealed. The principal grounds urged by appellant have to do with the sufficiency of the evidence and the reception of hearsay testimony. Other errors assigned have been considered by us, though not discussed herein.

Arthur Higgins, undersheriff, was permitted to testify to a [1] conversation had with one Dumphy, charged jointly with defendant but not on trial with him, concerning Teubner's opening a gambling-room, without the introduction of any testimony tending to show a conspiracy between Dumphy and defendant. The testimony should have been excluded. However, the error was cured by Dumphy, called as a witness, who, in answer to a question upon cross-examination, testified that defendant had told him that he intended opening a gambling-room.

The testimony shows that defendant and twelve others were [2] present in the room with the doors locked, the blinds drawn, and a card game (designated by one of the witnesses as studhorse poker) in progress; that a sale was made by defendant to one of the witnesses of chips of the value of \$10 for use in the game; that the defendant was participating

therein; that an attempt was made by the persons present, including defendant, to escape from the room when the officers entered; and that there was an absence of furniture, except tables and chairs, and the presence of a large number of chips and packs of cards in the room.

The trial court which denied the motion for a new trial heard and saw the witnesses testify and was in a better position than we to determine the weight of the testimony and the credibility of the witnesses. We will not disturb its ruling.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

WITHERS, RESPONDENT, v. PACIFIC MUTUAL LIFE INSURANCE CO., APPELLANT.

(No. 4,204.)

(Submitted September 24, 1920. Decided November 15, 1920.)

[193 Pac. 566.]

Accident Insurance—Death—Complaint—Burden of Proof—Prima Facie Case—Directed Verdict—Presumptions.

Accident Insurance—Death—Complaint—Sufficiency.

1. The complaint in an action to recover upon an accident insurance policy which, among other things, provided for indemnity for loss of life by external, violent and accidental means, alleging, in substance, that the insured sustained bodily injury caused solely by such means, to wit, by a gunshot wound in the neck fired by his wife, *etc.*, *held* sufficient to show accidental death.

Same—Burden of Proof—Rebuttal—Presumptions.

2. In the action above, the burden was upon plaintiff to show that death was caused by external, violent and accidental means; whereupon,

As to provision in accident insurance policy exempting insurer or limiting its liability in case of an injury intentionally inflicted by another, see note in 48 L. R. A. (n. s.) 524.

Authorities passing on the question of death as within provision exempting insurer, or limiting liability in case of injury intentionally inflicted, are collated in a note in 6 A. L. R. 1338.

to defeat liability under the policy, it was incumbent on the defendant to rebut the case thus made, the presumption being that the shot was fired by decedent's wife accidentally and not with intent to murder.

Same—*Prima Facie* Case—Directed Verdict—When Proper.

3. *Held*, that plaintiff's evidence simply showing that deceased died on a certain day from a wound in the neck caused by a bullet from a revolver fired by his wife, was sufficient to make out a *prima facie* case, and that, in the absence of evidence on the part of defendant, the court was warranted in directing a verdict for plaintiff.

Prima Facie Case Made by Plaintiff—Duty of Defendant.

4. Where plaintiff has made a *prima facie* case, the defendant must rebut it or fail in the action.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Mary Withers against the Pacific Mutual Life Insurance Company of California. From a judgment for plaintiff and an order denying its motion for a new trial, defendant appeals. Affirmed.

Mr. Frank W. Haskins, Mr. John F. Davies and Mr. Miles J. Cavanaugh, for Appellant, submitted a brief; Mr. Cavanaugh argued the cause orally.

There was no evidence of the accidental nature of any injury received by John Withers.

The plaintiff's whole case rests upon the naked presumption that the injury, if there was an injury, was the result of an accident, while we contend that the evidence rebuts this presumption and shows, if it shows anything, that the shooting was intentional, and under the presumption of law was justifiable, and if justifiable must have been the natural and proximate result of John Withers' own acts, and must have been anticipated by him, and therefore was no accident.

It is a legal presumption that his wife did no wrong when she shot John Withers. This presumption exists at all times and everywhere, and is a presumption the law ever makes. There is a general presumption that all men act rightly. (1 Jones' Blue Book, p. 14, secs. 13-15.) And the presumption is declared by our Code, and by the law generally that Beatrice Withers intended the consequences of her voluntary

acts. (Sec. 7960, Rev. Codes.) At best we are met here with two or more conflicting presumptions, and in such case they nullify each other and leave the matter at large to be proved by positive or direct testimony. (1 Jones' Blue Book, p. 164, sec. 27, p. 488, sec. 100.)

One who voluntarily assaults another—and we must presume that John Withers gave his wife a justifiable cause, if we are to give effect to the presumption of innocence on her part—and is killed does not die by accident. (*Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469; *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625, 54 Am. St. Rep. 486, 45 N. E. 563; *Cunard S. S. Co. v. Kelley*, 126 Fed. 610, 61 C. C. A. 532.) An effect which is the natural and probable result of an act or course of conduct cannot be said to be the result of accidental means. (*Hutton v. State Acc. Ins. Co.*, 267 Ill. 267, Ann. Cas. 1916E, 577, L. R. A. 1915E, 127, 108 N. E. 296; *Fidelity & Casualty Co. v. Stacey's Exrs.*, 143 Fed. 271, 6 Ann. Cas. 955, 5 L. R. A. (n. s.) 657, 74 C. C. A. 409; *Taliaferro v. Travelers' Protective Assn.*, 80 Fed. 368, 25 C. C. A. 494; *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104, 47 Am. St. Rep. 638, 30 L. R. A. 209, 28 S. W. 877; *Gaines v. Fidelity & Casualty Co.*, 188 N. Y. 411, 11 Ann. Cas. 71, 81 N. E. 169.) Where the killing was intentional, it cannot be said to have been by accidental means. (*Union Accident Assn. v. Willis*, 44 Okl. 578, L. R. A. 1915D, 358, 145 Pac. 812; *Union Casualty etc. Co. v. Harrol*, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080; *Ryan v. Continental Casualty Co.*, 94 Neb. 35, Ann. Cas. 1914C, 1234, 48 L. R. A. (n. s.) 524, 142 N. W. 288; *Campbell v. Fidelity etc. Co.*, 109 Ky. 661, 60 S. W. 492.)

Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a cause the judge is bound to leave it to the jury. But the modern rule is that there must be sufficient evidence upon which a jury can reasonably base a verdict. How much stronger should the evidence be when the court will be justified in taking the

case from the jury? Our Code provides that only in cases where the question is one of law can the court decide it. In this case there was no direct proof of the fundamental facts of accident and cause of death, and as plaintiff's contention rested merely upon presumption and guesswork, the court was in error in deciding the case in favor of plaintiff. (*National Assn. v. Scott*, 155 Fed. 92, 83 C. C. A. 652.)

Messrs. Maury & Wheeler and *Mr. A. G. Shone*, for Respondent, submitted a brief.

Courts have held that bare marks of extreme violence is *prima facie* evidence that the death resulted from body injuries through external, violent and accidental means. (*Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep. 184, 43 N. W. 731, 32.)

Counsel for the defendant rely on the proposition that the shooting was intentional, and, under the presumption of law, was justifiable, and if justifiable, must have been the natural and proximate result of John Withers' own acts, and must have been anticipated by him, and therefore was no accident. Injuries intentionally inflicted upon the body of the insured either by his own hand while insane or that of another are deemed accidental and chargeable to the insured, unless excepted from the risks assumed. The policy in question does not except injuries intentionally inflicted upon insured by others, and furthermore, defendant does not plead that the injuries were intentionally inflicted. Intentional injury is a matter of defense, and the burden of proof of such an affirmative defense of intentional injuries being pleaded, is on the defendant. (*Guldenkirch v. United States Mut. Acc. Assn.*, 5 N. Y. Supp. 428; *Railway Officials etc. Assn. v. Drummond*, 56 Neb. 235, 76 N. W. 562; *Ging v. Travelers' Ins. Co.*, 74 Minn. 505, 77 N. W. 291.) If the policy does not provide that the company shall not be liable where the injuries are intentionally inflicted by the insured (as in this case) or any other person, an injury not anticipated nor naturally to be

expected by the assured, though intentionally inflicted by another, is an accident. (*Accident Ins. Co. of North America v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Phelan v. Travelers' Ins. Co.*, 38 Mo. App. 640; *Robinson v. United States Mut. Accident Assn.*, 68 Fed. 825; *Hester v. Fidelity etc. Co.*, 69 Mo. App. 186.) In the case of *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104, 47 Am. St. Rep. 638, 30 L. R. A. 209, 28 S. W. 877, the question arose under the following facts: The deceased, who was insured against death by accident, while a guest in a tavern was provoked by the indecent behavior of another guest. He attempted to expel him from the house and in the struggle which ensued the insured was shot and killed by the one he sought to expel. The death in this case was held to be accidental. The court concluded that the deceased could not reasonably have expected such a fatal termination of his attempt to expel a disagreeable person, since under the circumstances he had no reason to believe the person attacked to be armed. (See, also, *United States Mut. Accident Assn. v. Barry*, 131 U. S. 100, 33 L. Ed. 60, 9 Sup. Ct. Rep. 755 [see, also, Rose's U. S. Notes].)

Injuries inflicted by another person upon the insured are considered to be accidents. (*American Accident Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473, 34 L. R. A. 301, 36 S. W. 169.) In the present case there is no evidence showing that Beatrice Withers (John Withers' wife) shot of her own voluntary act. If she did, the intention on her part to kill should have been pleaded and proved by the defendant, otherwise the usual presumption of ordinary accident will exist.

MR. JUSTICE HURLY delivered the opinion of the court.

This action was brought by the plaintiff as beneficiary in an accident insurance policy issued by the defendant company to John Withers, plaintiff's son, which policy provided indemnity for loss of life, limb, sight or time by external, violent and accidental means, excluding suicide or attempts

[1] thereat; *etc.* The complaint alleges the execution and delivery of the policy and performance of conditions on the part of the insured, and then alleges that the insured "sustained bodily injury caused solely by external, violent and accidental means, excluding suicide, sane or insane, or any attempt thereat, sane or insane, to-wit, he was shot in the neck by a bullet from a revolver, the said revolver being shot at the time by John Withers' wife, no further particulars being known to plaintiff; that the effect of such bodily injury was his death within twenty-four hours after he sustained such bodily injury." To this complaint a special demurrer was interposed upon the grounds, among others, that the complaint is uncertain, in that it fails to allege whether the injury sustained by Withers was caused solely by external, violent and accidental means; that no facts are alleged showing that such injury was the effect of or caused by accidental means; that there are no allegations disclosing the nature or character of the proof to sustain the allegations; that the plaintiff does not allege whether the shooting of deceased was an accident, or intentional upon the part of the wife of deceased, or the probable result of deceased's own unlawful acts; that the complaint contains no sufficient statement of facts concerning the nature and circumstances of the death of Withers. In addition the defendant demurred generally, upon the ground that the complaint does not state a cause of action. These demurrers were overruled, and defendant answered, to which answer there was reply. It is not necessary, however, to discuss the answer or the reply as the issues raised thereby are not involved in this appeal.

The proof introduced was very brief. The testimony on the part of plaintiff was given by the plaintiff and a sister of deceased and an undertaker residing in Butte, none of whom were present in Nevada, the place where the insured met his death, and none of whom purport to testify as to the cause of death except that when he was brought to Butte for burial he had a wound upon his neck over the jugular vein. In

addition, the plaintiff offered the deposition of one Harrison Russell, an undertaker residing at Las Vegas, Nevada, who testified that he had known deceased for something like four months prior to the time he was killed. This witness, after stating that deceased was killed on Thanksgiving Day, 1916, testified as follows: "Q. Do you know who killed him? A. His wife. Q. Do you know how he was killed? With what instrument? A. With a revolver, I think. Q. Do you know who fired that revolver? A. His wife."

This testimony was received over objection made at the trial. The defendant offered no testimony, and the foregoing is a concise statement of the case as made by the plaintiff. The defendant moved for a nonsuit upon the ground that the evidence failed to disclose that the death of the insured was caused solely by external, violent and accidental means, excluding suicide, sane or insane, or any attempt thereat, sane or insane, which motion was by the court denied. The court granted a motion for directed verdict made by plaintiff, after denying a motion for nonsuit. From the judgment and an order denying a motion for new trial defendant appealed.

No citation of authority is given in support of the demurrers to the complaint. In our opinion the complaint was sufficient. In fact, in its essential provisions it is very similar to the complaint in *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. Ed. 308, 8 Sup. Ct. Rep. 1360 [see, also, Rose's U. S. Notes], hereinafter cited.

The testimony as to the incidents connected with the death [2, 3] of the insured is slight, but is sufficient to establish the death of insured by external and violent means. No effort was made to strike the answers as not responsive to questions asked, nor was any attempt made by propounding preliminary questions to test the sources of the knowledge of the witness; nor, so far as shown by the record, was any cross-examination had.

In cases upon accident policies containing provisions similar to those in the policy sued upon, the burden is, of course,

upon the plaintiff to show that death was caused by external, violent and accidental means, and when the plaintiff has sustained this burden, the defendant must rebut the plaintiff's case, if it is to recover verdict.

It is asserted by defendant that the evidence is as susceptible of being construed as establishing murder of the insured by his wife, or at least an intentional killing of the insured by her act, as of establishing death by accident.

Upon the questions urged, we find many decisions. In the case of *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. Ed. 308, 8 Sup. Ct. Rep. 1360 [see, also, Rose's U. S. Notes], it was held that the claimant under the policy must establish by direct and positive proof that the death or injury of the insured was the result, not only of external and violent, but of accidental means, and that the requirement of direct and positive proof does not make it necessary to establish the fact and circumstances of death by persons who were actually present when the insured was injured, but that such proof may be made by circumstantial evidence. Also it was there held that suicide is not to be presumed, nor is it to be presumed that the insured was murdered.

In the leading case of *Jones v. United States Mut. Acc. Assn.*, 92 Iowa, 652, 61 N. W. 485, the defendant was shot and killed by another during a quarrel. The court said: "Appellant asked several instructions to the effect that the burden of proof was upon the plaintiff to show that the death of Jones, the beneficiary in the policy, was the result, not only of external and violent means, but also of accidental means. In other words, it was claimed that the burden was upon the plaintiff to show that the death of Jones was accidental, within the meaning of the policy. The court told the jury that if plaintiff had 'shown by the fair weight of the evidence that the assured came to his death as the result of a pistol shot held in his own hands, or in the hands of another, then the law will presume that the shot was accidental, and that it was not inflicted with murderous or suicidal intent. And under such

circumstances the burden will be upon the defendant to overcome this presumption, and to show that the death was not caused by accidental means.' The instruction was correct. It can make no difference, so far as defendant's liability is concerned, whether Wade fired the shot with the intent to kill Jones or not. If he had such intent when he fired the shot, and if Jones was not at fault in the matter—if he did nothing to cause or provoke the act—then, clearly, as to Jones, the injury resulting from the shot was accidental. In the absence of evidence to the contrary, the law presumes that Jones was without fault. There was no direct testimony to show that Wade, in firing the shot, had any intent to injure or kill Jones. Then, the presumption which the law raises where one has been killed by external and violent means, as in this case, that the injury was the result of accident, will prevail until overcome by evidence. *Utter v. Travelers' Ins. Co.*, [65 Mich. 545, 8 Am. St. Rep. 913], 32 N. W. 812; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, [32 L. Ed. 308], 8 Sup. Ct. Rep. 1360 [see, also, Rose's U. S. Notes]; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, [7 Am. Rep. 410]; *Accident Ins. Co. of North America v. Bennett*, [90 Tenn. 256, 25 Am. St. Rep. 685], 16 S. W. 723. It must also be borne in mind that the provisions and conditions of the policy in the case at bar do not cover, in terms, the case of injuries inflicted upon the assured by another person, and in this respect this case is, in its facts, unlike the *McConkey Case*. There was therefore no error in giving and refusing instructions relating to this matter. 1 American and English Encyclopedia of Law, p. 89; *Supreme Council v. Garrigus*, 104 Ind. 133, [54 Am. Rep. 298], 3 N. E. 818; *Hutchcraft's Exr. v. Travelers' Ins. Co.*, 87 Ky. 300, [12 Am. St. Rep. 484], 8 S. W. 570; *Accident Ins. Co. of North America v. Bennett*, [90 Tenn. 256, 25 Am. St. Rep. 685], 16 S. W. 723." In addition, see, also, *Caldwell v. Iowa State Traveling Men's Assn.*, 156 Iowa, 327, 136 N. W. 678; *Taylor v. Pacific Mutual Life Ins. Co.*, 110 Iowa, 621, 82 N. W. 326; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 Am. St. Rep.

184, 43 N. W. 731; *Preferred Acc. Ins. Co. v. Fielding*, 35 Colo. 19, 9 Ann. Cas. 916, 83 Pac. 1013; *Aetna Life Ins. Co. v. Milward*, 118 Ky. 716, 4 Ann. Cas. 1092, 68 L. R. A. 285, 82 S. W. 364; *Freeman v. Ins. Co.*, 144 Mass. 572, 12 N. E. 376; *Allen v. Travelers' Protective Assn. etc.*, 163 Iowa, 217, 48 L. R. A. (n. s.) 600, 143 N. W. 574; *Stevens v. Continental Casualty Co.*, 12 N. D. 463, 97 N. W. 862; also, *Tuttle v. Pacific Mut. Life Ins. Co.*, ante, p. 121, 190 Pac. 993, and cases cited.

The rule is thus stated in 1 Corpus Juris, 475 (section 278): "Where, however, it is apparent that the injury to or death of the insured was the result of external and violent means, and the issue is as to whether it was due to an accident within the meaning of the policy, or to some cause excepted by the policy, the presumption is in favor of accident and against the existence of facts bringing the case within any of the exceptions of the policy, such as insanity of the insured, intentional injury inflicted by a third person * * * and suicide. These presumptions may, however, be overcome by facts and circumstances establishing the contrary."

It is apparent, therefore, that under the great weight of authority plaintiff's evidence made a *prima facie* case. As [4] said by this court in numerous decisions, when a *prima facie* case is made by plaintiff, the defendant must rebut the case so made, or fail in the action. (*State v. Nielsen*, 57 Mont. 137, 187 Pac. 639, and cases there cited.)

The plaintiff having established *prima facie* the allegations of the complaint, and there being no other evidence offered, the trial court was not in error in directing verdict for plaintiff.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

BALDWIN, RESPONDENT, v. SILVER, APPELLANT.

(No. 4,214.)

(Submitted September 25, 1920. Decided November 15, 1920.)

[193 Pac. 750.]

***Attorney and Client—Fees—Evidence—Admissibility—Trial—
Motion to Strike Testimony—Accounts Stated—Conversion—
Instructions.*****Attorney and Client—Fees—Evidence—Admissibility.**

1. In an action to recover attorney's fees, admission in evidence of the *remittitur* from the supreme court in a cause in which plaintiff claimed to have rendered services after remand to the district court was proper for the purpose of showing the necessity for legal services after the case was sent back.

Trial—Evidence—Motion to Strike as not Responsive—Proper Denial.

2. Where the major portion of the answer of a witness was responsive to a question propounded to him on cross-examination, a motion to strike out the whole answer as not responsive was properly denied, it having been incumbent upon counsel to point out the portion not deemed responsive.

Attorney and Client—Fees—Account Stated—Admissibility in Evidence.

3. An account rendered to and received by defendant showing charges for legal services in a larger amount than that testified to by defendant as having been agreed upon by the parties, *held* admissible in rebuttal.

Account Stated—Retention Without Objection—Effect.

4. The retention of an account stated for an unreasonable length of time by a debtor without objection is evidence of his assent to its correctness.

Trial—Offer of Proof—Proper Rejection as Repetition.

5. Defendant's offer of proof, in surrebuttal, covering a point previously testified to by him, was properly rejected as repetition.

Same—Instructions—Reduction in Number Commendable.

6. Where defendant, in an action on implied contracts for legal services, offered three instructions of similar import covering three causes of action in which he had interposed the defense of an express contract, the court's modification of one so as to make it apply to all three causes of action and then refusing the other two, *held* proper, reduction of the number of instructions in a simple case being commendable.

Attorney and Client—Fees—Proper Refusal of Instruction on Conversion.

7. Refusal of an instruction offered by defendant on the subject of conversion in connection with his counterclaims in an action to recover for legal services, where conversion was not charged directly in either of them, the court, treating the counterclaims as seeking to recover for moneys had and received, having fully advised the jury as to defendant's rights in the premises, was not error.

'Appeal from District Court, Silver Bow County; J. D. Dwyer, Judge.

ACTION by James M. Baldwin against J. R. Silver. Judgment for plaintiff and defendant appeals. Affirmed.

Mr. Francis A. Silver, for Appellant, submitted a brief and argued the cause orally.

Self-serving declarations are not admissible in evidence. (*Curtsinger v. McGown* (Tex. Civ.), 149 S. W. 303; *Seevers v. Cleveland Coal Co.*, 158 Iowa, 574, Ann. Cas. 1915D, 188, 138 N. W. 793; *Fearing v. Kimball*, 4 Allen (Mass.), 125, 81 Am. Dec. 690.) The important cases in support of the doctrine under discussion are collected in a note to *State v. MacFarland*, Ann. Cas. 1914B, 788.

“When plaintiff in rebuttal is permitted to introduce new matter, defendant is properly permitted to introduce evidence in surrebuttal, and to decline to permit him to do so is error, especially where the evidence offered in surrebuttal is for the first time made competent by the evidence introduced by plaintiff in rebuttal.” (38 Cyc., p. 1358; *City of Rock Island v. Starkey*, 189 Ill. 515, 59 N. E. 971; *Stewart v. Anderson*, 111 Iowa, 329, 82 N. W. 770; *State v. Buchler*, 103 Mo. 203, 15 S. W. 331; *Wade v. Thayer*, 40 Cal. 578; *McLeod v. Lee*, 17 Nev. 103, 28 Pac. 124; *Comstock v. Smith*, 20 Mich. 338.)

It is the duty of an attorney who has collected money for a client to turn over the money to the client within a reasonable time or upon demand. (*Ott v. Hood*, 152 Wis. 97, Ann. Cas. 1914C, 636, 44 L. R. A. (n. s.) 524, 139 N. W. 762; 2 R. C. L. 1022, sec. 104; 6 Corpus Juris, 693, sec. 220; Mechem on Agency, sec. 531.) The attorney, however, in turning over the money collected to his client, has the right to retain enough of the money collected to pay his own fee and disbursements. (*Conyers v. Gray*, 67 Ga. 329; *Union Bldg. & Sav. Assn. v. Soderquist*, 115 Iowa, 695, 87 N. W. 433; *In re Klein*, 101 N. Y. Supp. 663, 666; *Robinson v. Hawes*, 56 Mich. 135, 22 N. W. 222; Weeks on Attorneys at Law, sec. 309 *et seq.*) What sum the attorney has a right to retain as a fee depends upon whether there was a special agreement

or not. The compensation of an attorney is left to the agreement of attorney and client, either express or implied. (Sec. 7153, Rev. Codes.) If there was an express agreement, the terms of the agreement would govern as to the amount of the fee. If there was no agreement as to the fee, the reasonable value of the services would determine the amount of compensation. (2 R. C. L. 1031.) An attorney who fails, within a reasonable time or upon demand, to turn over money collected on behalf of his client, less his fee and disbursements, is liable in an action for conversion for the amount unlawfully retained. (*Ott v. Hood*, *supra*; Weeks on Attorneys, sec. 309.)

In view of the fact that the offered instruction on the subject of conversion impartially covered the issues involved in the first counterclaim and correctly stated the law governing the case, the court's refusal to give it was error.

Mr. Lowndes Maury, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The complaint herein sets up ten causes of action; of these nine are based on implied contracts for the reasonable value of plaintiff's services rendered as an attorney at law, the second being for the sum of \$4.50 paid out as costs.

The defendant interposed a general denial to the second, ninth and tenth causes of action, and admitted the allegations of the eighth; as to the first, fourth and fifth, he admitted that the services were rendered, denied that the amount claimed was the reasonable value of such services or that they were rendered under an implied contract, and alleged affirmatively that such services were rendered under express contracts fixing the amount of the fee. As to the sixth and seventh causes of action, defendant admitted the services rendered and alleged payment. He alleged that, in the action

mentioned in the third cause of action, the services were rendered under an express contract for a contingent fee. The answer then alleges, as a counterclaim, that plaintiff collected the sum of \$925.40 on a certain judgment and refused to turn over the sum of \$223.25, though demand was made upon him, and that he was entitled to withhold but \$50, under the express contract existing, whereby plaintiff was to attend to all cases defendant might have in the district court, at \$50 for each case; and, as a second counterclaim, the answer alleges that plaintiff secured possession of certain certificates of stock of the value of \$459.20, which he refused to turn over to defendant on demand.

Replying to the first counterclaim, plaintiff alleged that the reasonable value of his services was \$200, and that the sum of \$23.25 was expended in necessary costs and disbursements in the action, and to the second interposed a general denial. The total amount claimed by the plaintiff was \$640; the amount of the counterclaim, \$632.45. The case was tried to a jury and resulted in a general verdict and judgment for the plaintiff in the sum of \$450. From this judgment defendant appeals.

1. The first specification of error is based on the court's [1] action in admitting in evidence the *remittitur* from the supreme court in an action wherein the plaintiff sought to recover for services rendered after the cause was sent back to the district court. While it is true that plaintiff was not seeking to recover for any services in the supreme court, the plaintiff testified, without objection, that the cause was sent back, and to the services rendered in conformity with the direction of the supreme court. The *remittitur* was, doubtless, admissible for the purpose of showing the necessity for further services rendered; but, even if immaterial, its introduction could not be, in the light of the record on the subject, prejudicial to the defendant.

2. Defendant complains of the court's refusal to strike the [2] answer of the witness Lamb to a question propounded

on cross-examination, as not responsive to the question. Considered in connection with the immediately preceding questions and answers, we are inclined to the belief that the entire answer was responsive; but, whether it was or not, as a whole, the major portion of the answer was certainly responsive to the question. The motion to strike does not point out to which portion of the answer it is directed, and the court cannot be put in error for ruling as it did on such a motion.

3. The third and fourth assignments will be considered [3,4] jointly. The defendant contended that the services alleged were rendered pursuant to an express agreement that plaintiff should handle all district court cases for \$50 each. In his defense he testified that "He attended to all my business and I paid him at the rate of \$50 in the district court and \$10 in the justice court, never one cent more." And again: "Fifty dollars is all I paid him in all cases, and \$10 in the justice court, never more or less." In rebuttal, plaintiff introduced an account rendered to and received by defendant, showing charges of more than \$50 for cases in the district court. This was objected to as "a self-serving declaration." The account showed credits amounting to a payment of the charges so made, and, in this respect, contradicted the testimony of the defendant. Had there been no settlement—of which there is some question in the record—the retention of the statement for an unreasonable length of time without objection is evidence of assent to its correctness. (*O'Hanlon Co. v. Jess, ante*, p. 415, 193 Pac. 65.) The ruling of the court was clearly correct.

The defendant offered, in surrebuttal, to prove that, in every [5] case tried in the district court, the plaintiff received the sum of \$50, and no other sum, as a fee for his services. This offer was rejected by the court, as repetition, and defendant contends that the rejection constitutes error. In the light of the testimony of the defendant quoted above, the court was right in so ruling. (*Cannon v. Lewis*, 18 Mont. 402, 45 Pac. 572.)

4. The remaining assignments are directed to the giving [6] and refusal of instructions. Defendant offered three in-

structions, similar in purport, covering the three causes of action in which the defense of an express contract was interposed. The court modified the first of these, which opened with the clause, "With reference to the first cause of action," etc., by striking the word "first" and adding the letter "s" to the word "cause." Defendant insists that error was committed in giving the modified instruction and in refusing thereafter to give the later instructions on the same subject; that the instruction as modified was directed to the issue under each and all of the causes of action and manifestly did not apply to other than the four in which the question of an implied or express contract was raised. The instruction correctly advised the jury as to those causes of action to which it did properly apply, and the jury could readily understand that it was not intended to apply to other than those causes of action; the remaining questions were so simple as to need no instruction for the guidance of the jury. While the instruction may not have been technically accurate, it could not have misled the jury. The action of the court in thus reducing the number of instructions given in so simple a case is to be commended, and we find no reversible error in connection with its action on these four instructions.

5. Error is predicated on the court's refusal to give a [7] number of instructions on the subject of conversion in connection with defendant's counterclaims. It will be noted that conversion is not charged directly in either of the counterclaims. The court evidently disregarded the question of conversion and treated the counterclaims as seeking to recover for moneys had and received, and fully advised the jury as to defendant's right to recover under his counterclaims, in the event it accepted the defendant's version of the transactions.

We find no reversible error in the record, and the judgment of the district court of Silver Bow county is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

SECURITY TRUST & SAVINGS BANK, APPELLANT, v.
RESER ET AL., RESPONDENTS.

(Nos. 4,186, 4,192.)

(Submitted September 20, 1920. Decided November 15, 1920.)

[193 Pac. 532.]

*Judgments—Rendition and Entry—Clerk of District Court—
Dismissal for Failure to Enter—Law of Case.*

Judgments—Entry by Clerk—When Unauthorized.

1. Upon lodgment of the findings of fact and conclusions of law of the trial judge in a foreclosure suit with the clerk of the district court, the extent of the latter's duty was to file them, and therefore his subsequent act in formulating a judgment and entering it at the request of counsel for the plaintiff was unauthorized and void.

Appeal and Error—Law of Case.

2. The principles announced by the supreme court in annulling on *certiorari* the unauthorized entry of judgment in an equity case was the law of the case on a subsequent appeal from a judgment dismissing the action for failure to have judgment entered within the six-months period prescribed by section 6714, subdivision 6, of the Revised Codes.

Judgment—What Constitutes.

3. The announcement of the ultimate conclusion of the court upon the issues submitted and a direction to the clerk to enter it constitute its judgment; until these things are done, the clerk has no right to enter judgment.

Same—Unauthorized Entry—Dismissal for Failure to Enter.

4. Where the clerk of the district court entered a final decree in a foreclosure suit, though the court had done no more than lodged with him its findings of fact and conclusions of law, there was no rendition of judgment, entry of which the successful party could demand, and hence his failure to demand it within six months after the clerk's unauthorized entry thereof did not constitute that neglect which warrants dismissal of the action under section 6714, Revised Codes.

Appeal from District Court, Blaine County, in the Eighteenth Judicial District; John A. Matthews, Judge of the Fourteenth District, Presiding.

ACTION by the Security Trust Savings Bank of Charles City, Iowa, against Evert Reser and others. Plaintiff appeals from a judgment of dismissal and from an order refusing to set aside said judgment. Reversed.

Messrs. M'Kenzie & M'Kenzie, for Appellant, submitted a brief; *Mr. John M'Kenzie, Sr.*, argued the cause orally.

No appearance in behalf of Respondents.

MR. JUSTICE COOPER delivered the opinion of the court.

Consolidated appeals, one being from a judgment of the district court of Blaine county dismissing plaintiff's action because of its failure and neglect to procure the entry of a judgment in its favor within the six-months period prescribed by subdivision 6 of section 6714 of the Revised Codes, and the other from an order refusing to set aside said judgment.

Upon receipt of the findings of fact and conclusions of law, prepared by the Honorable John A. Matthews, the presiding judge, the clerk of the district court, without express direction or pronouncement by the court, on request of plaintiff's attorneys, filed and entered what purported to be a final judgment of foreclosure of mortgages covering the property described in the pleadings. The action of the clerk in proceeding further than the filing of the findings was declared a nullity. (*State ex rel. Reser v. District Court*, 53 Mont. 235, 163 Pac. 1149.) On April 9, 1917, after the decision of this court, the plaintiff gave notice to defendants that on May 8, 1917, it would move that judgment be entered *nunc pro tunc* as of July 12, 1916, the day upon which the clerk of the court undertook to enter judgment in the case. The Honorable W. B. Rhoades, the judge of that district, because of the fact that Judge Matthews had tried the cause and had transmitted to the clerk his findings of fact and conclusions of law, declined to entertain the motion. Later, on the sixteenth day of June, 1917, the attorneys for the plaintiff served upon the defendants and their counsel a notice that it would, on July 20, 1917, move the court and Honorable John A. Matthews that the findings made by him and filed be ordered refiled as of the date of the filing thereon, to-wit, July 8, 1916, and that judgment be signed and filed in conformity with such

findings of fact and conclusions of law and filing, as of July 12, 1916, the date when the clerk of the court attempted to enter judgment in the cause. The ground upon which the motion was to be made was that the plaintiff was entitled to have judgment rendered and entered upon the findings of fact and conclusions of law as made by Judge Matthews, and that no judgment had as yet been entered. On August 10, 1917, the matter was presented to Judge Matthews, who was presiding at the time on the invitation of Judge Rhoades, and the motion denied. Thereupon a motion was made by defendants to dismiss the action because the plaintiff had neglected to have judgment rendered by the court and entered by the clerk in accordance with the Code section above referred to. This motion the court sustained and dismissed the action. Hence these appeals.

When the findings of fact and conclusions of law prepared [1,2] by Judge Matthews were received by the clerk it became his duty to file them. (Rev. Codes, sec. 6763.) This the clerk did. Having reached this stage of the proceeding, what final steps were necessary to exhaust the judicial power, complete the trial, and make the proper entries? The acts of the clerk in formulating and entering judgment upon the court's findings—assuming them to be the last judicial utterance and expressive of its final decision—were declared by this court to be void—an attempt upon the part of a ministerial officer to perform judicial functions. In this situation there had been no rendition of judgment, no deliverance of final judgment upon the merits, and no judgment to enter. The judgment of the court is its pronouncement upon the issues submitted; the record being merely historical and evidentiary. (*State ex rel. Anderson v. District Court*, 56 Mont. 244, 184 Pac. 218.) Mr. Justice Sanner, expressing the views of this court upon the former hearing, pointed out the fundamental difference between judicial and ministerial functions, and the varying processes by which decrees in equity and judgments at law are reached, decreed and entered, and stated principles which must

now be regarded as the law of this case and our guide in disposing of it. He proceeds thus:

“Judgments, like the causes of action from which they spring, are either at law or in equity—the latter, for purpose of instant distinction, being commonly termed ‘decrees,’ and between the two classes great and fundamental differences exist. A judgment at law is absolute, inflexible, expressive of the invariable rules of law applicable to the established facts in issue, taking no note of the situation of the parties or the means of enforcing the liability declared by it. A decree, on the other hand, is seldom predetermined as to its terms, by the general decision for or against the plaintiff or the defendant; it stands upon the particular merits of the controversy as they impress themselves upon the conscience of the chancellor, guided by principles broader than those of the law; it is the decision of the man who frames it as the interpreter of the moral standard which equity sets up; it is adjustable to all the exigencies of the litigation and to all the degrees of right or merit by which the parties may be distinguished, and it may, as often happens, contain specific directions for carrying out its purposes, provisions fixing the status of the parties, or prescriptions touching their course of conduct. (Freeman on Judgments, sec. 9; Black on Judgments, sec. 1; *Broder v. Conklin*, 98 Cal. 360, 364, 33 Pac. 211.) The application of these distinctions and their consequences are made manifest by the circumstances of this case. No such decree as the one before us was commanded by the finding in point of fact or followed from them as a necessary inference.”

In the recent case of *McIntyre v. Northern Pac. Ry. Co.*, [3] *ante*, p. 256, 191 Pac. 1065, Chief Justice Brantly, in defining the proper practice governing the rendition and entry of judgments, states: “The announcement of the decision by the judge in open court and the entry of it in the minutes constitute the rendition of the judgment. In equity cases, if the decision is general or the findings are not accompanied by conclusions of law embodying specific directions as to the

adjustment of the rights of the parties, the clerk has no authority to enter the judgment. In assuming to do so, he assumes to perform judicial functions, whereas his duty in this respect is ministerial. He may not act at all until the terms of the judgment have been fully fixed by the court."

While in this case the court fixed the status of the parties [4] and ordered the clerk to file its findings, it made no formal announcement that they imported finality and constituted rendition of judgment. If the findings as prepared and filed were incomplete, defective or unresponsive to the issues, it was still open to counsel to move their amendment or correction in either or all respects. No suggestion or motion of this character appearing in the record, we must assume that none were interposed. Upon this showing, the failure of the court to render judgment in accordance with its findings cannot be characterized as an omission of the plaintiff—as neglect to have judgment entered for more than six months after final decision. The decision the parties invoke when they submit their rights to the court for determination includes every judicial step or requisite act to final judgment upon their rights. "Final judgment" means the finish of the judicial labor, pronouncement of the ultimate conclusion of the court upon the case, and a direction to the clerk to enter judgment. Until these things are done, the case is still in process of judicial determination, and not ripe for the entry of judgment, because judgment has not yet been rendered.

From a reading of the statute, it is manifest that its purpose is to bring an end to litigation by compelling the prevailing party to have judgment entered; and, the more effectually to impel that end, dismissal of the action is visited upon the successful party if he permits six months to pass between the rendition and the entry of the judgment in disregard of its provisions. Until the time limit between the two distinct and dissimilar acts has passed, the running of the statute has not commenced, and the successful party cannot be charged with the neglect the statute punishes. Forfeitures are not favored, unless by a strict application of the statute justice

can be done in no other way. An abandonment of the fruits of victory cannot be imputed to one who did not know of his victory and whose failure was unintentional and excusable. (*Rule v. Butori*, 49 Mont. 342, 141 Pac. 672. See, also, *Soliri v. Fasso*, 56 Mont. 400, 185 Pac. 324.) The present action falls within the class of cases in which no judgment has ever been rendered, but which, so far as the plaintiff could make it, is in condition for the rendition of final judgment. (Freeman on Judgments, sec. 57.) The failure of plaintiff to have judgment entered was not imputable to negligence on its part, but was due to the failure of the court to render final judgment. In this condition of the record, Judge Matthews, at the end of his consideration of the case, should have ordered judgment entered. This we believe he intended to do, as the making of the order dismissing the action indicates.

The judgment and order are therefore reversed, with directions to the district court to render and have judgment entered *nunc pro tunc* in accordance with the motion of the plaintiff in that behalf.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY and HURLY concur.

MR. JUSTICE MATTHEWS, being disqualified, takes no part in the foregoing decision.

**ADVANCE-RUMELY THRESHER CO., APPELLANT, v.
TERPENING ET AL., RESPONDENTS.**

(No. 4,217.)

(Submitted September 25, 1920. Decided November 17, 1920.)

[193 Pac. 752.]

Contracts of Sales—Inconsistent Defenses—Breach of Warranty—Rescission—Estoppel—Election of Remedies—Consideration—Partial Failure—Evidence of Value—Failure of Proof—Use of Article After Discovery of Defect—Waiver—Voluntary Retaking and Cancellation—Evidence—Insufficiency.

Contracts of Sale—Inconsistent Defenses—Rescission—Breach of Warranty—Election of Remedies.

1. In an action to recover the purchase price of farm machinery in which defendant relied as defenses on rescission of the contract for failure of consideration and on breach of warranty, the court erred in refusing plaintiff's motion to compel defendant to elect on which of the two inconsistent defenses he would rely.

Pleadings—Inconsistent Defenses Permissible, When.

2. Inconsistent defenses may be pleaded, provided they are not so far inconsistent as to be incompatible.

Contracts of Sale—Recovery of Purchase Price—Defenses—Remedies Available.

3. A dissatisfied buyer may either confirm the contract and sue for damages for breach of warranty, or rescind and sue for recovery of partial payments made, but he cannot rescind and thereupon recover on the contract which has been rescinded and therefore is no longer in being.

Same—Rescission—Estoppel.

4. Where a buyer of farm machinery continued in possession thereof and operated it for practically three seasons and up to the time the seller brought action to recover the purchase price, the former was estopped to claim rescission of the contract for failure of consideration.

Same—Personal Property—Breach of Warranty—Measure of Damages.

5. The measure of damages for a breach of warranty on a sale of personal property is the difference in value between the article sold and what it should be according to the warranty.

Inconsistent defenses within rules of pleading, see note in *Ann. Cas.* 1917C, 704.

On purchaser's election to rescind for breach of warranty as affecting recovery against seller, see note in 27 *L. R. A. (N. S.)* 925.

On use as waiver of right to rescind for breach of warranty or non-compliance with contract, see note in 36 *L. R. A. (N. S.)* 467.

The question whether contract is entire or divisible as affecting rescission by seller is discussed in a note in 2 *A. L. R.* 665.

On the question of entirety or divisibility of contract for sale as affecting purchaser's right to rescind in part and affirm in part, see note in 2 *A. L. R.* 654.

Same—Divisibility—Consideration—Partial Failure—Value—Failure of Proof—Effect.

6. Where a contract of sale comprising a traction engine and other pieces of farm machinery provided that it was divisible and that failure of any one of them to fulfill the warranty accompanying it should not affect the liability of the buyer for any other, and the buyer in an action to recover their price defended on the ground of breach of warranty, his evidence showing defects in the engine only but failing to show what portion of the purchase price covered it, the jury was in no position, under the above rule, to award defendant damages suffered by reason of the alleged breach as to it.

Same—Breach of Warranty—Notice—Retention and Use After Discovery of Defect—Waiver.

7. Retention and use of farm machinery for more than two years after discovery of an alleged breach of warranty, without attempt on the part of the buyer to comply with the terms of the contract of sale requiring him to give immediate notice to the vendor of defects discovered, barred him from relying on the breach as a defense in an action to recover on the notes given in payment.

Same—Voluntary Retaking and Cancellation—Evidence—Insufficiency.

8. Defendant's allegation of a voluntary retaking of the machinery by the seller and a consequent cancellation of the contract, *held* not supported by evidence to the effect that its agent, on failure of defendant to meet payments as stipulated, removed a drive belt from one of the machines, which, however, was promptly returned on written demand of defendant on his promise that he would make payment as soon as possible.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

ACTION by the Advance-Rumely Thresher Company against A. W. Terpening and another.

From a judgment for defendants and an order denying its motion for a new trial, the plaintiff appeals. Reversed and remanded.

Mr. M. J. Lamb, for Appellant, submitted a brief and argued the cause orally.

No appearance in behalf of Respondents.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The complaint herein consists of two causes of action. The first alleges the execution and delivery, for a valuable consideration, by A. W. Terpening and Gertie M. Terpening, his wife, of certain promissory notes, aggregating the sum of

\$1,963.50, dated October 2, 1912; that the payment of said notes and interest was secured by the execution and delivery of a chattel mortgage on a certain traction engine with attachments, a gang-plow, breaker bottoms, and stubble bottoms, and all attachments and tools used therewith, and as additional security the execution and delivery of a mortgage on certain real estate. The second cause of action alleges the execution and delivery by the same makers, of certain promissory notes bearing date August 23, 1913, for a valuable consideration and aggregating \$1,032, which notes were secured by a chattel mortgage on the tractor engine above mentioned and on a separator, wagon and other machinery and attachments, and also by a second mortgage on the real estate described in the first cause of action.

The answer admits all of the allegations of the complaint and admits that plaintiff would be entitled to the relief sought were it not for the facts alleged in nine separate special defenses and counterclaims therein set out. These allege the purchase of the machinery mortgaged from plaintiff's assignor by defendant A. W. Terpening, alleged to have been induced by knowingly false and fraudulent representations; total failure of consideration by reason thereof; breach of the warranties contained in the contracts of sale; the expenditure of \$600 in an attempt to make the traction engine work; the payment of \$1,200 on the purchase price notes described in the first cause of action, and \$195 on those described in the second cause of action, and that the machinery purchased was wholly worthless. As a further separate defense defendants allege that the plaintiff took from their possession the separator and its attachments, and converted the same to its own use, and thereby abandoned its second cause of action. The answer closes with a prayer that plaintiff take nothing, and that defendants be awarded a decree of cancellation of the notes and mortgages, and judgment for the sum of \$1,200.

Replying, the plaintiff admits the purchase of the property alleged in the answer, and denies all other allegations of the special defenses and counterclaims; sets up the signed order and agreement of purchase and contract of sale, showing the

warranties therein contained and the manner in which the purchaser shall proceed to give notice of a failure of any part of the machinery to fill the warranty, and that failure to so proceed shall constitute a waiver of the warranty and a full release of the company. The reply then alleges that defendants never gave notice of any defect or failure to fill the warranty as provided in the contract and order, or at all.

On the day of the trial the defendants were permitted to make numerous amendments to their answer, among which we find the following: "The defendants allege that upon the breach of the warranty above set forth, they notified the • • • company thereof, and thereupon its agents and employees at various times attempted to remedy said defects, but were unable to do so; that they thereupon abandoned all attempts to make the engine comply with the warranties, and repossessed themselves of said engine and separator, with all attachments, and rescinded the contract of sale; that the defendants complied with all the provisions of said warranty as to which it was their duty to do anything, and the failure, if any, on their part in this behalf was by reason of the facts above set forth, and the acts of the • • • company above alleged, waived by said company."

The action seems to have been tried throughout by both the court and counsel, on the theory that it was an action at law, and resulted in a verdict for \$1 in favor of the defendants on which judgment was entered for \$1 and costs. The plaintiff has appealed from the judgment and an order denying its motion for a new trial.

On the trial the plaintiff introduced the notes and mortgages and evidence of the devolution of title thereto from the Rumley Products Company to itself, and rested.

1. At the opening of the defense, counsel for plaintiff moved [1] the court to compel the defendants to elect on which of their several defenses they would rely, which motion was denied, the court stating that the ruling was "with the understanding that there isn't any question of rescission in the case." The court thereupon announced: "The position of the defendants is two defenses. One is that there was no con-

sideration at all, that the machinery was worthless; and the other is that there was a breach of warranty, and that they were entitled to recover the amount of money expended in trying to get the thing to work.”

While it is difficult to ascertain just what position the defendants take in their nine separate defenses, it seems clear that they rely, first, on a rescission of, or the right to rescind, the contract and have the money which they had paid on the contract returned to them, by reason of the alleged failure of consideration; and, second, on their right to recover damages for a breach of warranty, and this is indicated even in the statement of the court in narrowing the issues, as above quoted. This being conceded, the court should have granted the motion and compelled the defendants to elect on which of the two defenses they would rely.

Although it is permissible, under our procedure, to set forth [2, 3] inconsistent defenses, they must not be so inconsistent as to be incompatible. (*Johnson v. Butte Copper Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *Day v. Kelly*, 50 Mont. 306, 146 Pac. 930; *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 481, 148 Pac. 330.) The buyer may affirm the contract and sue for damages for the breach of warranty, or he may rescind the contract and sue for a recovery of the money paid; but he cannot insist that the contract has been rescinded and yet recover on the contract. (30 Am. & Eng. Ency. of Law, 2d ed., 199; *Abraham Bros. v. Browder*, 114 Ala. 287, 21 South. 818; *Osborne & Co. v. Poindexter* (Tex. Civ. App.), 34 S. W. 299; *Houser & Haines Co. v. McKay*, 53 Wash. 337, 27 L. R. A. (n. s.) 925, 101 Pac. 894; *Doornbos v. Thomas*, 50 Mont. 370, 147 Pac. 277.) As was said by this court in the *Doornbos Case*: “When the plaintiff, after a fair trial of the drill, discovered the defects in it, he had these options: (1) To rescind the contract if the facts justified it and recover the purchase price; * * * (2) to retain the drill and bring his action for damages for a breach of the warranty; or perhaps (3) to bring his action for the fraud practiced upon him. * * * If the purchaser elects to exercise the first option, he is bound by his election, and cannot

thereafter sue for a breach of the warranty. The measure of damages is the purchase price [citing cases]. The rule as stated in these cases prevails in most jurisdictions, even though title has passed to the purchaser, and the contract does not specifically stipulate for a rescission. In this jurisdiction the right of the purchaser to rescind does not exist if title has passed to him, unless the warranty was intended to operate as a condition. (Rev. Codes, sec. 5121.) Subject to this limitation, the rule as stated above must be correct, for the reason that by exercising his option to rescind the purchaser has elected to extinguish the contract (Rev. Codes, sec. 5062), and by doing so has dissolved entirely his relation with the seller created by it, thus incidentally adjusting also all the rights growing out of it. In *Abraham Bros. v. Browder, supra*, the rule is stated thus: 'There must be a subsisting contract to support an action for a breach of warranty. If the facts justify it, a buyer may rescind a contract and sue for the purchase money paid; or he may sue and recover damages for a fraud practiced upon him; or he may affirm the contract and maintain an action for breach of warranty. He cannot insist that a contract has been rescinded, and yet recover on the contract.' "

However, as defendants continued in possession and operated [4] the machinery throughout the fall of 1912 and the seasons of 1913 and 1914, and in fact up to the time of the commencement of this action when the property was taken into the custody of the sheriff, there can be no question of a rescission of the contract, and they must defeat the plaintiff's case, if at all, on the theory of a breach of warranty.

2. Plaintiff's fourth, fifth, sixth and seventh assignments of error are directed to the insufficiency of the evidence to warrant the verdict, and will be considered together.

As to the notes and mortgages set forth in the second cause of action, aggregating the principal sum of \$1,032 representing the purchase price of the separator and attachments, purchased at a different time and under a separate contract from the other machinery, no evidence whatever was offered by the defendants to support their allegations of either a failure of

consideration or a breach of warranty, and the defendants' liability on these notes remained, therefore, unquestioned, and the jury was instructed that as to these notes a finding in favor of the plaintiff must be made.

As a defense to the notes and mortgages set forth in the [5, 6] first cause of action, the only evidence introduced tending to show a breach of warranty was directed to alleged defects in the traction engine, particularly the working of the clutch and the consequent breaking of "eyebolts." This contract of purchase included the traction engine, plows and plowshares. The contract was, by its terms, made divisible as follows: "This order is divisible as to each machine and the failure of any separate machine or attachment to fulfill the warranty shall not affect the liability of the purchaser for any other machine or attachment hereby ordered."

"Whether or not the contract is entire or divisible depends on the intention of the parties. The intention is to be ascertained from the language used, the subject matter of the contract, and from a consideration of the circumstances." (2 Elliott on Contracts, 1543.)

There was no attempt to show what portion of the purchase price covered the tractor and what portion the plows and plowshares. Assuming that the evidence shows a failure of consideration or a breach of warranty as to the engine, it can be no more than a partial failure of consideration for the notes or a breach of warranty as to the engine alone. In the absence of some proof as to the value of the engine, the jury was in no position to determine the damage the defendants suffered by reason of the breach as to the engine, even though they believed it was without value.

In *J. I. Case T. M. Co. v. Scott*, 96 Wash. 566, 165 Pac. 485, the supreme court of Washington said: "Under contract of sale of a plow and engine, providing that the order is divisible as to each machine and attachment, and that failure of a separate machine to fill the warranty shall not affect buyer's liability for any other, the plow fulfilling the warranty,
* * * the buyer must pay therefor, notwithstanding breach

of warranty as to the engine.” (See, also, *Aultman & Taylor Co. v. Lawson*, 100 Iowa, 569, 69 N. W. 865; *Nichols & Shepard Co. v. Wiedman*, 72 Minn. 344, 75 N. W. 208, 76 N. W. 41; *Mulcahy v. Diendonne*, 103 Minn. 352, 115 N. W. 636.)

Under like circumstances, the court of civil appeals of Texas said: “Under the facts of the case, there was not a total breach of the warranty, for much of the machinery was not defective; and, such being the case, if the defendant desired to recover the damages sustained by reason of a partial breach, he should have proved such items of damages, which was not done.” (*Gilbert v. Gossard* (Tex. Civ. App.), 73 S. W. 989; *Moline Plow Co. v. Wilson* (Okl.), 176 Pac. 970.)

Inasmuch as the defendants offered no evidence of any defect in the plows and plowshares, it is evident that the notes and mortgages set out in the first cause of action were given for some value; what that value was, taking the defendants’ statement that the engine was worthless as true, does not appear. “The measure of damages for a breach of warranty on a sale of personal property is the difference in value between the articles sold and what it should be according to the warranty.” (Rev. Codes, secs. 6061, 6062; *Hogan v. Shuart*, 11 Mont. 498, 28 Pac. 969; *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 406.)

But, aside from these considerations, we are of the opinion [7] that the defendants could not, under the provisions of their contract and the proof adduced in the case, successfully defend against either cause of action alleged in the complaint. Their contract with the company provides: “If, inside of five days from the time of its first use, it shall fail in any respect to fill the warranty, written notice shall be given immediately by the purchaser to the vendor at its home office * * * by registered mail, * * * and failure to give the notice as provided, or the keeping and using of the machinery after five days allowed as provided, * * * shall be a waiver of the warranty and a full release of the warrantor without in any wise affecting the liability of the purchaser for the price of the machinery or the liability to pay the notes given therefor.”

The testimony of the defendant A. W. Terpening, which it is contended constituted a waiver of compliance with the provisions quoted, is to the effect that on the delivery of the machinery the clutch on the engine did not work properly and as a consequence the eyebolt broke; that he thereupon went to the manager of the branch house at Billings; stated that "this clutch is breaking on us, and we want it fixed some way," and was told that a man would be sent out to fix it; that the clutch continued to break the eyebolts, and finally, when they got the eyebolts to hold, the spider broke. The witness then states that he had a conversation with the branch manager, when the first note came due, about December 1, 1912, or two months after the delivery of the engine and after he had plowed approximately fifty acres of land with it, when, he states, he told the branch manager that they would have to make it work better or he would not keep it, and that the branch manager promised to make it run or put in another. The record, however, shows that the defendants, notwithstanding the fact that they claim that the engine was never put in shape to work properly, retained possession thereof, and continued to use it throughout the seasons of 1913 and 1914, and never at any time notified the head office of the failure of the persons sent to correct the difficulty, to make the engine fill the warranty. The record further discloses that Terpening was himself a salesman of the company, and had sold many such engines under like contracts and must have had actual notice of the provisions of such a contract and of what steps he must take in order to avail himself of a right of action, or defense on breach of warranty. In this connection the contract of sale specifically provided: "That if the party who is sent by the vendor upon such notice to remedy the difficulty cannot make it fill the warranty, the purchaser shall give *immediate notice* to the vendor, by registered mail or prepaid telegram sent to its home office at La Porte, Indiana." And again: "It is agreed that parties holding commission contracts, salesmen, mechanical experts or *branch managers*, have no authority to make contracts of sale or to bind

the vendor or to *modify*, or enlarge or *waive* any of the terms thereof."

If we should hold that, notwithstanding such agreement, the action of the branch manager amounted to a waiver of the condition requiring notice in the first instance, we still have nothing to show a compliance with the requirement of a second notice, and nothing in the testimony to excuse the giving thereof.

The remarks of this court in the case of *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653, are pertinent here: "It is not a function of the courts to make contracts for private parties, but when private parties freely contract with each other and the terms of their contracts are not unlawful, it is the duty of courts to enforce them. If the defendant expected to stand upon the warranties, his course under the contract was to ascertain whether the outfit could meet the warranties before putting it to other uses, or at least not to use it after ascertaining that it was a failure. * * * Under this contract, use of the outfit for twenty days constituted not merely a waiver, but an acceptance and a waiver; if the acceptance had not been made to also constitute a waiver, it would still remain an acceptance. A breach of warranty which has not been waived may be pleaded by way of counterclaim to an action on the purchase price, but it cannot be relied on as a defense, after acceptance and retention of the purchaser, with knowledge of the breach." This seems to be the generally accepted rule. (*Minnesota Threshing Machine Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145; *Garr-Scott Co. v. Green*, 6 N. D. 48, 68 N. W. 318; *J. I. Case Co. v. Hall*, 32 Tex. Civ. App. 214, 73 S. W. 835; *Aultman-Taylor Co. v. Weir*, 67 Kan. 674, 74 Pac. 227; *Larson v. Minnesota Threshing Machine Co.*, 92 Minn. 62, 99 N. W. 623; *J. I. Case Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131; *Avery Planter Co. v. Peck*, 86 Minn. 40, 89 N. W. 1123; *Heagney v. J. I. Case Co.*, 4 Neb. (Unof.) 745, 96 N. W. 175.)

Having retained and used the engine for more than two years after discovery of the alleged breach of warranty—in fact up to the very time of the commencement of this action—

without attempting to comply with the terms of their contract regarding notice, the defendants are in no position to assert a breach, as a matter of defense, to the recovery on the notes and foreclosure of the mortgages.

Defendants allege a voluntary retaking of the machinery [8] by the company and a consequent cancellation of the contract, but these allegations are not supported by the proof. The record discloses that, the defendants being in default on one or more of the installment notes, a collector for the company removed the drive belt from the separator, but this was promptly returned on the written demand of defendant A. W. Terpening, coupled with the statement that he would pay the amount due as soon as possible. The only other taking of the property, as disclosed by the record, was by the sheriff, after the commencement of this action and the placing in his hands of the chattel mortgages for foreclosure.

While the defendants allege that they paid out \$600 in attempts to make the engine do the work, defendant A. W. Terpening testified generally that he expended, during the three periods he was operating the engine, \$1,200 to \$1,400; on cross-examination he recalled various small sums he had paid out for repairs, but made no attempt to fix the time of such payments, and we find nothing in the contract warranting a recovery for moneys expended in replacing broken or wornout parts of the machinery.

3. The motion for a new trial was submitted to the successor of the judge who tried the case, but upon the cold record the motion should have been sustained and a new trial granted.

The judgment of the district court is reversed and the cause remanded, with direction to said court to grant a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and COOPER concur.

STATE EX REL. CHICAGO, MILWAUKEE & ST. PAUL RY.
CO., RESPONDENT, v. GIBB, JUSTICE OF THE PEACE, AP-
PELLANT.

(No. 4,468.)

(Submitted September 27, 1920. Decided November 19, 1920.)

[193 Pac. 1114.]

*Justices of the Peace—Time of Trial—Postponements—Juris-
diction—Default Judgments—Vacation—Certiorari.*

Certiorari—Does not Lie, When.

1. Where appeal is available, *certiorari* does not lie even though the remedy by appeal may not be adequate.

Justices of the Peace—Appeal—Jurisdiction.

2. The right of appeal from a justice court presupposes jurisdiction in it to enter the judgment or order from which an appeal may be taken; hence where such court was without jurisdiction, none was acquired by the appellate court on an attempted appeal.

Same—Appeal—Jurisdiction of Appellate Court.

3. On appeal from a justice court to the district court the cause is tried anew, the district court sitting as a justice of peace, with no greater jurisdiction than the latter court had.

Same—Default Judgment—Lack of Jurisdiction—Certiorari.

4. A justice of the peace on April 5, the day set for trial of a civil action, continued the cause "for the present"; he later fixed the day for hearing the case for June 2, and, being out of the city on that day, continued it to June 16, when, defendant not appearing within one hour, he entered judgment by default. *Held*, that by failing to comply with the provisions of sections 7033-7037, Revised Codes, relating to time of trial and postponements in justices' courts, he was without jurisdiction to enter judgment, and that the district court on *certiorari* properly annulled it.

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

Certiorari by the State, on the relation of the Chicago, Milwaukee & St. Paul Railway Company, against John Gibb, Justice of the Peace in and for Miles City Township, Custer County. From a judgment setting aside a judgment of the justice court, defendant appeals. Affirmed.

Cause submitted on brief of Appellant.

Mr. P. F. Leonard, for Appellant.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

Certiorari. In March, 1918, issue was joined in a civil action in the justice court at Miles City; nothing further was done in the case until April 1, 1919, when the justice of the peace set the cause for April 5, but on that date made an entry continuing the case "for the present." Later June 2, 1919, was fixed as the day of trial, but on that day the justice of the peace was absent from the city. The cause was then set for trial on June 16, 1919, and counsel given written notice thereof. On June 16, the defendant not appearing within one hour, judgment was entered for the plaintiff. Thereupon a writ of *certiorari* was issued out of the district court of Custer county, return thereto made, and a hearing had, resulting in a judgment vacating and setting aside the judgment of the justice court. This appeal is from the judgment.

1. Appellant contends that "The court erred in assuming jurisdiction of this cause by *certiorari* proceedings, as the relator had adequate remedy by appeal." If an appeal lies, [1, 2] *certiorari* does not lie, and it is immaterial, under our statute, whether appeal affords an "adequate remedy" or not. (*State ex rel. King v. District Court*, 24 Mont. 494, 62 Pac. 820, overruling former decisions to the contrary.) However, the right of appeal presupposes jurisdiction in the lower court to enter a judgment or order from which an appeal may be taken. If the lower court is without jurisdiction, none is acquired by the appellate court on an attempted appeal. (*Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385; *In re Searles*, 46 [3] Mont. 322, 127 Pac. 902.) All appeals from a justice court to the district court are tried anew (Rev. Codes, sec. 7122); the district court then "sits as a justice of the peace in that case, and with no greater jurisdiction" (*State ex rel. Grissom v. Justice Court*, 31 Mont. 258, 78 Pac. 498).

2. The remaining assignments challenge the correctness of [4] the judgment. The district court found that the justice court lost jurisdiction by failing to comply with the provisions of Chapter 6, Title 11, Part 2, of the Revised Code, and in this

was clearly correct. This question was settled in *State ex rel. Akin v. Williams*, 50 Mont. 582, 148 Pac. 333, and requires no further discussion.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

CAMPBELL, RESPONDENT, v. ORIENTAL TRADING CO.
ET AL., APPELLANTS.

(No. 3,861.)

(Submitted September 20, 1920. Decided November 19, 1920.)

[193 Pac. 1112.]

*Principal and Agent—Corporations—Authority of Local Agent
—Liability of Principal—Evidence—Sufficiency.*

Agency—Apparent Authority—How Determined.

1. The apparent authority of an agent to act as the representative of his principal must be gathered from all the facts and circumstances in evidence, and is, ordinarily, a question of fact.

Same—Local Agent—Scope of Authority.

2. An agent to whom is intrusted the management of its local affairs may bind his company by a contract necessary and proper to be made in the ordinary prosecution of its business.

Same—Liability of Principal—Evidence—Sufficiency.

3. *Held*, that evidence showing, among other things, that it was the duty of the agent of a company engaged in furnishing crews of laborers for railroad track maintenance work, to arrange for the needs of the crews and get things in shape so that the men would be taken care of, etc., his principal was liable for goods purchased by him in the shape of groceries, supplies, etc.

(MR. CHIEF JUSTICE BRANTLY dissenting.)

Appeals from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by P. H. Campbell against the Oriental Trading Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Mr. William Wallace, Jr., Mr. John G. Brown and Mr. T. B. Weir, for Appellant, submitted a brief; *Mr. Weir* argued the cause orally.

Mr. H. S. Hepner, for Respondent, argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

This is an action to recover for merchandise alleged to have been sold and delivered to the defendant.

The plaintiff testified that on the morning of December 6, [1-3] 1917, H. Tarada, accompanied by one N. Goto, came to his place of business in the city of Helena, presented a card upon which was printed his name and the words the "Oriental Trading Company," introduced himself, represented himself to be the agent of the defendant, and stated that a gang of Japanese laborers employed by defendant were working in and about the tracks, yards and roundhouses of the Northern Pacific Railway in the city of Helena, and that groceries and other supplies would be needed for their subsistence. Addressing the plaintiff, he said: "You let this man Goto, who is foreman of the gang, have goods and charge to him, Goto, extra gang No. 6 and send the bill to us not later than the 25th of the month, and we will pay for the goods."

The plaintiff, relying upon the statement of Tarada, delivered to Goto goods of the value for which this suit is brought. On December 25, obeying the directions of Tarada, plaintiff mailed to defendant at Livingston, "in care of H. Tarada, account Oriental Trading Co.," a bill therefor. A period of several weeks having elapsed and no reply thereto having been received, the plaintiff, through a Helena bank, drew a draft directed to "H. Tarada, account Oriental Trading Co., Livingston, Montana," for the amount of the bill, which draft was later returned to the bank unpaid.

The authority of Tarada to speak for the defendant, and to fix liability upon it for the goods sold and delivered to Goto, is the vital question upon which this appeal must be determined. There is no dispute concerning the sale and delivery of the goods. The president of the defendant company was

sworn as a witness on the plaintiff's case, and testified that he knew Tarada; that Tarada stayed at Livingston, and at times interpreted between the foremen of the gangs and the men; that at the time in question defendant maintained a branch office in the city of Livingston, in this state, but that the main office of the company was at Seattle, in the state of Washington; that defendant was under contract with the Northern Pacific Railway Company to furnish to it gangs of Japanese laborers to work upon its tracks and elsewhere, for which the railway company paid it in one check; and that for supplies purchased upon the credit of his company for the use of the gangs, deductions were made and the balance paid to each of the Japanese laborers upon signing the payroll. This, coupled with the other testimony in the record, justified the district court in assuming that the success of the enterprise in which the defendant was engaged depended upon its ability to keep its gangs of workmen up to a given standard in numbers and efficiency by insuring them an adequate supply of food and clothing; and that the authority exercised by Tarada in pledging the credit of the defendant to that end was essential and indispensable to the carrying out of its contract with the railway company. (21 Ruling Case Law, par. 33, p. 854.) True, the witness did not specifically admit that Tarada was clothed with authority to answer for the defendant; but in reaching its ultimate conclusion that Tarada actually had authority to bind the defendant to pay for the goods delivered to Goto, the trial court had the right to assume that the statements of the witness that it was Tarada's duty "to arrange for the needs of the gangs," and "to get things in shape so that the men will be taken care of and the Oriental Trading Company protected," taken with all the other evidence before it, fairly implied that fact.

In view of all the evidence in the record, and the inferences properly to be drawn from it, including the failure of the defendant to disclaim the authority exercised by Tarada, the court had a right to determine that the defendant had authorized Tarada to make his assurance its own. The apparent authority of an agent to act as the representative of his prin-

cial is to be gathered from all the facts and circumstances in evidence, and, ordinarily, that is a question of fact for the determination of the court, or the jury, as the case may be. (21 Ruling Case Law, par. 34, pp. 856, 857.) Were the rule otherwise, agency would be impossible of proof by anything less than a direct admission of the fact—something the adverse party may be very reluctant to make. The case falls within the well-settled principle that an agent to whom is intrusted the management of its local affairs may bind the company by a contract necessary and proper to be made in the prosecution of its business. (*Trent v. Sherlock*, 24 Mont. 255, 61 Pac. 650; *Spelman v. Gold Coin M. & M. Co.*, 26 Mont. 76, 91 Am. St. Rep. 402, 55 L. R. A. 640, 66 Pac. 597; *General Hospital Society v. New Haven etc. Co.*, 79 Conn. 581, 118 Am. St. Rep. 173, 9 Ann. Cas. 168, 65 Atl. 1065.)

From a careful review of all the evidence, we are convinced that the trial court correctly estimated the credibility of the witnesses, the weight to be given to their testimony, and the authority actually delegated to Tarada. We have carefully considered all the other questions of law urged in the brief of counsel, and find no merit in any of them.

Our conclusion is that the substantive evidence in the record is amply sufficient to uphold the judgment and the order denying defendant a new trial. They are therefore affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. CHIEF JUSTICE BRANTLY: I dissent for the reason that I do not think there is sufficient proof of agency.

Rehearing denied December 18, 1920.

MONTANA MEAT CO., RESPONDENT, v. ORIENTAL TRADING CO., APPELLANT.

(No. 3,862.)

(Submitted September 20, 1920. Decided November 19, 1920.)

[193 Pac. 1113.]

Principal and Agent—Corporations—Authority of Local Agent—Liability of Principal—Evidence—Sufficiency.

1. *Held*, on the authority of *Campbell v. Oriental Trading Co.*, *ante*, p. 520, that where a reputed agent of defendant directed plaintiff to furnish to the foreman of a gang of railway track laborers supplies necessary for their maintenance, the same to be charged to the company, the latter was liable, it appearing, *inter alia*, that defendant had paid for the first bill of goods so sold but declined to pay for the one in suit.

(MR. CHIEF JUSTICE BRANTLY dissenting.)

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by the Montana Meat Company against the Oriental Trading Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Mr. Wm. Wallace, Jr., Mr. John G. Brown and Mr. T. B. Weir, for Appellant, submitted a brief; Mr. Weir argued the cause orally.

Mr. H. S. Hepner, for Respondent, argued the cause orally.

MR. JUSTICE COOPER delivered the opinion of the court.

By stipulation of the parties it was agreed that all the evidence presented in case No. 3,861, *Campbell v. Oriental Trading Co.*, *ante*, p. 520, 193 Pac. 1112, should be admitted and considered by the court in the present case, and, subject to the objections there made, the issues of both law and fact should be determined thereon.

It appears in the testimony that Tarada, the reputed agent [1] of the defendant, accompanied by N. Goto, foreman of extra gang No. 6, went into the place of business of the plaintiff and made representations similar to those made to P. H. Campbell, the plaintiff in the preceding case, *viz.*, that he was

the agent of the Oriental Trading Company, and that he desired plaintiff to sell and deliver to Goto supplies for the gang under his charge, to charge them to him (Goto), and send the bill to "us" not later than the 25th of the month, and "we" would pay the bill; that after some discussion, plaintiff delivered the goods required to Goto, and, apprehending that difficulty might arise if the account were not presented before December 25, pay-day, on December 15 plaintiff forwarded that account, addressed to "H. Tarada, agent of the Oriental Trading Company, at Livingston, Mont." In addition to the evidence considered in the preceding case, it appeared that after some conversation over long-distance telephone with some person in the office of the defendant at Livingston a check was forwarded from that place in payment for the goods sold to Goto. The account here involved covers merchandise sold and delivered by plaintiff to defendant between December 15, 1914, to February 3, 1915. For these reasons and those given in the opinion in case No. 3,861, *Campbell v. Oriental Trading Co.*, ante, p. 520, 193 Pac. 1112, the judgment and order denying a new trial are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY and MATTHEWS concur.

MR. CHIEF JUSTICE BRANTLY: I dissent for the reason that I do not think there is sufficient proof of agency.

Rehearing denied December 18, 1920.

**IN RE ESTATE OF BRUHNS. BRUHNS, RESPONDENT, v.
BRUHNS ET AL., APPELLANTS.**

(No. 4,231.)

(Submitted November 19, 1920. Decided November 19, 1920.)

[193 Pac. 1114.]

***Probate Courts—Jurisdiction—Distribution of Estates—Decrees
of Foreign State—Presumptions—Statutes—Judicial Notice.***

**Probate Courts—Residence of Decedent in Other State—Distribution
of Estate in This and Sister State.**

1. An intestate died in California leaving property there of the value of less than \$1,500, and also property in this state; the probate court of California distributed all of the property there situated to the widow; the court in Montana, in proceedings not intended as ancillary to those had in California, and regardless of what she had received in that state, awarded to her one-third of the Montana property and two-thirds to the children. *Held*, that the decree was correct as in accordance with statute.

Same—Jurisdiction not Extraterritorial.

2. Jurisdiction of district courts in this state in probate matters pertaining to real property is confined to property situated within its boundaries, any order or decree affecting realty in another state being a nullity.

Judicial Notice—Statutes of Other States.

3. Where rights are based upon statutes of another state, the statutes must be pleaded and proved, since courts of this state cannot take judicial notice of statutes of sister states.

Probate Courts of Other States—Decrees—Presumptions.

4. A decree made by a court of another state in a probate proceeding will be presumed to have been made within jurisdiction and in accordance with its laws, and is conclusive upon courts of this state in every matter in which it is conclusive in the foreign state.

***Appeal from District Court, Custer County in the Sixteenth
Judicial District; C. C. Hurley, Judge in the Seventh District.
Presiding.***

PROCEEDINGS to administer the estate of Henry Bruhns, deceased, wherein Aline Bruhns filed objections to the administrator's report and from an order of distribution, Paul E. Bruhns and others appeal. Modified and affirmed.

Cause submitted on briefs of Counsel.

For authorities discussing the question of conclusiveness of foreign probate as affecting real property, see notes in 6 L. R. A. (n. s.) 617; 9 Ann. Cas. 422; 14 Ann. Cas. 977; 115 Am. St. Rep. 518.

Messrs. Nichols & Wilson, for Appellants.

Mr. Geo. W. Farr and *Mr. H. E. Herrick*, for Respondent, and *Mr. W. C. Wilde*, of the Bar of San Diego, California, of Counsel.

MR. JUSTICE HURLY delivered the opinion of the court.

Henry Bruhns, a resident of California, died in that state intestate in the year 1914, leaving surviving a widow, this respondent, a daughter, and four sons, appellants herein. At [1] the time of his death he owned property in California, probated in that state and of the net value for distribution, in the sum of \$1,280.82, which, by the probate court of the county of his residence, was awarded to the widow. He also owned real property in this state, which was sold in the course of probate proceedings in Custer County, the net value of which is \$1,929.84. The administrator appointed in Montana, in making his final report and petition for distribution, alleged that under the laws of California and of the state of Montana, one-third of all the property of the deceased, after the payment of the indebtedness of the deceased and the expenses of administration, is required to be distributed to the widow, and the remaining two-thirds to the five children of the deceased in equal shares, but that the said widow had received, and has the exclusive benefit of all the property of the deceased within said state of California to the exclusion of said children, and that the property so received by said widow greatly exceeds in value the one-third interest in all the property of the deceased to which, under the law, she was entitled, and that therefore she should not have distributed to her any part of the money in the hands of the Montana administrator.

Respondent filed her objections to such report on the ground that the order of the California court in setting aside all of the property in that state to her was made in accordance with the laws of that state and is conclusive on all the heirs of the deceased, and she asserts her right to receive one-third of the residue of the Montana property, regardless of the fact that all of the California property was awarded to her.

After hearing, the court sustained the objections of the respondent and distributed the estate, awarding her one-third and the remaining two-thirds to the children. By an oversight, however, the name of Paul E. Bruhns was omitted from said award, and it is conceded by appellants and respondent that his name should be included as one of the distributees.

Copies of the inventory of the property, decree of distribution and final discharge of the administrator in California are annexed to the final report. In the inventory are included sundry items of real and personal property, of the appraised value of \$1,468.82. The inventory contains the recital: "The estate mentioned in the foregoing inventory is community property." The decree of distribution recites that the net value of the estate is less than \$1,500, "that the said surviving widow does not have a maintenance derived from her own property equal to the said estate of said deceased," and then awards to her the entire estate in California.

We are in effect asked to hold that the proceedings in California in awarding the property to the widow were under statutory provisions similar to those found in our section 7513, Revised Codes; the California section being section 1469 of the Code of Civil Procedure.

The position of appellant is that the provision found in each of the above statutes for summary disposition of estates of intestates when "it appears that the value of the *whole estate* does not exceed fifteen hundred dollars," means the whole estate wherever situated, and therefore that the value of the "whole estate" exceeds \$1,500, in consequence of which it follows that the California decree was erroneous, and that in the proceedings here appellants should be allowed to have deducted from the widow's distributive share of the Montana property a sum sufficient to enable the sons and daughter of the deceased to obtain, so far as the proceeds of the estate will permit, their two-thirds interest in the value of the properties in the two states.

We do not deem it necessary to cite authorities to the effect [2] that jurisdiction of the courts in Montana in probate matters pertaining to real estate is confined solely to prop-

erty situated in this state, and that any order or decree affecting realty in another state would be a nullity. Likewise the California probate courts may make no binding orders pertaining to real property in this state. (Sec. 7919, Revised Codes.) The deceased having been a resident of California at the time of his death, the probate courts of that state were, of course, authorized to make any orders within their jurisdictional powers relating to decedent's property there, subject to attack only upon grounds not pertinent to a decision of this case.

So far as appears from the record, we do not learn that the children of deceased participated in the California proceedings, nor that any reference was made to the Montana lands, nor that any appeal has been taken from any of the orders of that court, and we assume that the same are in full force and effect.

While it may be that the decree in California was made under the provisions of the statute above referred to (though [3] the statement is made in the inventory that the property was community property, an ownership not recognized in this state), we are not permitted to take judicial notice that it was so made. We could as well assume that the property was exempt from execution, and that, in accordance with the provisions of sections 1465 and 1468 of the California Code of Civil Procedure (secs. 7509, 7512, Rev. Codes), the court awarded the same to the surviving widow. However, we may not indulge in either of such assumptions. Where rights are based upon the statutes of sister states, there must be a sufficient pleading and proof thereof. (*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 14 L. R. A. 588, 28 Pac. 291; *McKnight v. Oregon etc. R. R. Co.*, 33 Mont. 40, 82 Pac. 661.)

But, conceding that the decree was made under the statute referred to by appellants, we know of no method of attacking [4] in our probate courts—they being courts of limited jurisdiction—the judgment or decree so made. What remedy, if any, the appellants may have, if the California decree is er-

roneous, we are not called upon to decide. To grant appellants the relief they ask in this court would be the equivalent of setting aside or modifying the California decree. We must assume that the court in that state was acting within its jurisdiction, and that its decree was in accordance with the laws of that state; therefore such decree is conclusive upon our courts in every matter in which it is conclusive in California. (*State ex rel. Ruef v. District Court*, 34 Mont. 96, 115 Am. St. Rep. 510, 9 Ann. Cas. 418, 6 L. R. A. (n. s.) 617, 83 Pac. 866.) Any other result, upon the record presented, would do violence to the full faith and credit clause of our federal Constitution (sec. 1, Art. IV).

We are not unmindful of the rules relating to ancillary administration in cases where property of a decedent exists in two or more states. But appellants assert, and respondent concedes, that the Montana proceedings are not intended as ancillary to those in California, and no attempt is made to bring the case within the rules governing such proceedings, and we therefore decide the appeal upon the contentions urged by the parties.

The decree was made in accordance with the provisions of our statute, no error appearing except as to the omission, in the decree of the name of Paul E. Bruhns as one of the sons and heirs of deceased. The cause is therefore remanded to the district court, with direction to modify the decree of distribution by making proper distribution to said Paul E. Bruhns, and, when so modified, it will stand affirmed.

Modified and affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, MATTHEWS and COOPER concur.

PARKER, APPELLANT, v. CITY OF BUTTE ET AL., RESPONDENTS.

(No. 4,728.)

(Submitted November 15, 1920. Decided November 22, 1920.)

[193 Pac. 748.]

*Cities and Towns—Floating Indebtedness—Funding Bonds—Statutes—Special Election.**Cities and Towns—Floating Indebtedness—Power to Issue Funding Bonds—Submission to Voters not Necessary.*

1. Under sections 3461 and 3462, Revised Codes, a city may, through its council, issue bonds for the purpose of funding its floating indebtedness, without submitting the matter to a vote of the taxpayers.

Same—Funding Bonds—Power of Legislature.

2. The legislature has power to grant cities and towns authority to fund their floating indebtedness.

Appeal from District Court, Silver Bow County; Joseph R. Jackson, Judge.

ACTION by John S. Parker against the City of Butte, and W. T. Stodden, its mayor. From a judgment for defendants, plaintiff appeals. Affirmed.

Mr. Michael Donlan, for Appellant, submitted a brief and argued the cause orally.

Mr. R. L. Clinton and *Mr. E. D. Elderkin*, for Respondents, submitted a brief; *Mr. Clinton* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

It appears from the complaint herein that the city of Butte is a duly organized municipal corporation, with an assessed valuation of \$90,000,000, amounting, for taxable purposes, to approximately \$30,000,000; that at a regular meeting of the city council, held on the twelfth day of July, 1920, the said council duly passed and approved a resolution authorizing and directing the issuance of funding bonds in the amount of \$600,000, the denominations of the bonds to be \$100, \$500 and

Whether funding existing debts increases municipal indebtedness, see note in 21 Ann. Cas. 1334.

\$1,000, to bear interest at not to exceed six per cent per year, interest payable semi-annually, for the purpose of funding and taking up outstanding city warrants totaling the full amount of such proposed bonds. The complaint further alleges that at the time of the passage of such resolution the city had an outstanding floating indebtedness of that amount, represented by city warrants issued in the manner prescribed by law, for valid municipal indebtedness incurred by the city, and the lack of money for the payment thereof, and that all of said warrants have been presented to the city treasurer for payment and payment refused for lack of funds. It is then alleged that the said city will proceed to issue, sell and exchange such funding bonds, unless restrained, and that no election has been held authorizing the issuance of the bonds; that the plaintiff is the holder of a large number of such outstanding unpaid city warrants, and is a taxpayer in the city of Butte; and, finally, "that the attempted issue, sale and exchange of said funding bonds without an election called and held in the manner provided by law for the submission of bond issues is illegal and without jurisdiction of the said city council and the said city mayor; and that all bonds so issued will be illegal and invalid and issued without warrant of law."

On the complaint the district court issued an order to show cause and a temporary restraining order. The defendants, in their answer and return, admit all of the allegations of the complaint, save and except the legal conclusions challenging the legality of their acts and the validity of the bonds when issued, and allege that the city council, legally constituted as it was, had power to pass, and did pass, the resolution which in itself was sufficient to authorize the issuance of said funding bonds. On the hearing the court entered judgment in favor of the defendants, and dissolved the temporary restraining order. From this judgment the plaintiff appeals.

The only question involved is as to the authority of the city, [1] through its duly constituted city council, to so fund its outstanding floating indebtedness without an election by the taxpayers authorizing or ratifying such action.

The plaintiff contends that it is "the general accepted theory that cities cannot issue bonds for any single purpose in excess of \$10,000, without an election," and cites in support thereof section 3259, subdivision 64, Revised Codes. The section referred to, however, authorizes the city council "*to contract an indebtedness on behalf of a city,*" for certain specified purposes, provided the total amount thereof, including the then existing indebtedness, must not exceed three per cent of the total assessed valuation of the taxable property of the city, and providing, further, that "no money must be borrowed on bonds *issued* for the construction, purchase or securing of a water plant, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers." A mere cursory reading of the section discloses that it has no application to the attempted action of the city council under consideration. The section refers only to the contracting of an indebtedness—an indebtedness in addition to the "then outstanding indebtedness of the city."

Here it is not sought to contract any indebtedness whatsoever, but merely to pledge the credit of the city by the issuance of bonds for the payment of an indebtedness which it was already obligated to pay. Thus it was said by this court, in the case of *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821, under analogous circumstances, that: "It is plain that the issuance of these bonds, which changed the form of the outstanding bonds, warrants, and orders of the county of Missoula, is not the creation of a new indebtedness or liability"—which statement is quoted with approval in *Palmer v. City of Helena*, 19 Mont. 61, 47 Pac. 209. However, the rule there announced, and on which counsel for the city rely, no longer applies to the affairs of counties, inasmuch as Title 2, Part 4, of the Revised Codes, was enacted subsequent to the announcement of that rule. Section 2933 is a part of said Title, and reads as follows: "The board of county commissioners must not borrow money for any of the purposes *mentioned in this Title*, or for any single purpose to an amount exceeding ten thousand dollars without the approval of a majority of the

electors of the county, and without first having submitted the question of a loan to a vote of such electors."

In *Edwards v. County of Lewis and Clark*, 53 Mont. 359, 165 Pac. 297, this court, after quoting the foregoing section, said: "'The purposes mentioned in *this Title*' include all the purposes enumerated in section 2905, for both sections are parts of the same title." (Section 2905 is the county's authority for the funding and refunding of outstanding indebtedness.) The court further said: "'The language is altogether different from that employed in the territorial statute, and in reviewing the history of the Act we cannot close our eyes to the fact that after this court had interpreted the former provisions, in *Hotchkiss v. Marion*, the legislature deliberately saw fit to make the radical change in phraseology, thereby furnishing the very best evidence that it was the intention to establish a rule different from the one announced in that case. The language, 'for any of the purposes mentioned in this title,' is as comprehensive as it can be made. The commissioners cannot borrow money to refund outstanding indebtedness exceeding \$10,000, by the issuance of bonds or otherwise, without having first obtained the approval of the electors of the county.'" The court, however, points out the distinction between the incurring of an indebtedness and borrowing money as follows: "'The terms 'incur indebtedness or liability,' as used in the Constitution, are not synonymous with the term 'borrow money,' used in section 2933. * * * It is apparent to any one that the indebtedness represented by the road warrants will not be discharged by issuing bonds and from the proceeds paying off the warrants, and that no new indebtedness will be incurred. The indebtedness will remain, but the evidence of it will be changed from the warrants to the bonds. The transaction is not unlike that of the individual who gives his note for an indebtedness represented by a duebill or open account, or who borrows from A. to pay B.'" With this distinction in mind, we have searched the statutes in vain for any prohibition against the action of the city council in providing for the funding of the outstanding indebtedness of

the city without submitting the matter to a vote of the electors or taxpayers.

As heretofore noted, subdivision 64 of section 3259 refers only to the right of the council to "contract an indebtedness on behalf of the city * * * by borrowing money or issuing bonds," and as the instant issue of bonds does not contemplate the contracting of an indebtedness, but merely the changing of the form of a pre-existing indebtedness, the restriction therein placed on the action of the council does not apply to the issuance of such funding bonds.

While it may be said that the action of the legislature in changing the rule laid down in the case of *Hotchkiss v. Marion, supra*, indicates a repugnance on the part of the law-making power to permit such action by public corporations, without first obtaining the consent of the electors who must bear the burden of providing the funds for repaying the loan, the courts must declare the law as they find it, and the rule laid down in the *Hotchkiss Case*, to the effect that: "The Constitution has recognized and preserved the distinction between laws which relate to the funding of an indebtedness which is already in existence, and the incurring of a new liability in an amount exceeding \$10,000. The approval of a majority of the electors is not essential to the validity of this action of the board of county commissioners"—is, in the absence of any legislative declaration to the contrary, still applicable to such action as is here proposed by the city of Butte, under sections 3461 and 3462 of the Revised Codes, which read as follows:

"3461. *Funded Debt*.—The council of any city or town having a floating indebtedness of ten thousand dollars or more may fund the indebtedness and issue bonds with coupons attached thereto, as hereinafter provided in this chapter.

"3462. *Proceedings to Fund*.—The council, by a resolution, must declare that the existing indebtedness of the town or city shall be funded by the issuance of such bonds. The bonds must be issued for a sum not less than one hundred dollars nor more than one thousand dollars. The interest thereon must not exceed six per cent. per year, payable semiannually, and may issue to any person holding city or town warrants,

indebtedness or just claims against a city or town prior to the passage of such resolution, at par.”

That the granting of such authority above to cities and [2] towns is within the power of the legislature cannot be questioned. (5 McQuillin on Municipal Corporations, p. 4824.)

No attack is made on the form of the resolution or the regularity of the proceedings of the city council. From the foregoing it is apparent that the city council acted within the power granted to it by the legislature, and that there is no legal impediment to the issuance and disposal of the funding bonds in question. The judgment of the district court is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and COOPER concur.

SPAULDING ET AL., RESPONDENTS, v. LAMBROS ET AL.,
APPELLANTS.

(No. 4,586.)

(Submitted November 15, 1920. Decided November 22, 1920.)

[193 Pac. 565.]

*Attorney and Client — Contracts — Validity — Public Policy—
Complaint—Sufficiency—Negative Pregnant.*

Attorney and Client—Fees—Complaint—Negative Pregnant.

1. The complaint in an action to recover attorneys' fees, which, after setting forth the rendition of the services at defendants' special instance and request and their reasonable value, alleged "that the defendants have not paid the same or any part thereof," held not open to the objection that the allegation of nonpayment was pregnant with the admission that someone other than the defendants might have paid the amount claimed before the action was begun, since there is no presumption that anyone will pay the debt of another.

*Same—Contracts—Securing Alien's Exemption from Military Service—
Public Policy.*

2. An agreement between an attorney and an alien who had not declared his intention to become a citizen of the United States, to establish the latter's exemption from military service under the Selective Service Act, was not void as in contravention of public policy, since, under that Act, aliens were not liable to military service during the war.

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

ACTION by C. A. Spaulding and others against Peter D. Lambros and another. From judgment for plaintiffs and an order denying their motion for new trial, defendants appeal. Affirmed.

Messrs. O'Flynn & O'Flynn and Mr. T. J. Davis, for Appellants, submitted a brief; *Mr. Ed. O'Flynn* argued the cause orally.

From the rule announced by this court and adhered to from 3 Montana down to 49 Montana, it is apparent that one of the vital allegations for a cause of action of the character at bar is the allegation that the amount claimed has not been paid, nor has any part thereof been paid. (*Hershfield v. Aiken*, 3 Mont. 442; *Van Horn v. Holt*, 30 Mont. 69, 75 Pac. 680; *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1044; *Beebe v. Jackson*, 32 Mont. 217, 79 Pac. 1051; *Cooper v. Romney*, 49 Mont. 119, Ann. Cas. 1916A, 596, 141 Pac. 289; *Lent v. New York & M. Ry. Co.*, 130 N. Y. 504, 29 N. E. 988; *Frisch v. Caler*, 21 Cal. 71.) Counsel may argue that the allegations appearing in paragraph V of their amended complaint is sufficient; however, the amended complaint would have greater strength for appellant without such allegation. The allegation that defendants have not paid the sum claimed comes absolutely within the rule of negative pregnant. It is an allegation pregnant in the admission that some person other than the defendants may have paid. This court has determined in the following cases that a negative pregnant is not good or sufficient pleading: *Toombs v. Hornbuckle*, 1 Mont. 286; *Bach, Cory & Co. v. Montana Lumber & Produce Co.*, 15 Mont. 345, 39 Pac. 291; *Yank v. Bordeaux*, 29 Mont. 74, 74 Pac. 77; *Agle v. Standard Drug Co.*, 29 Mont. 111, 74 Pac. 135.

The testimony in this cause shows that a great part of the services rendered by the plaintiffs was rendered in obtaining affidavits from influential men in the city of Butte, known to

plaintiffs, which affidavits were to be used, undoubtedly, for the purpose of exercising what influence they might upon the action of the district exemption board. In view of this fact the case falls within the rule announced in *Spaulding v. Maillet*, 57 Mont. 377, 188 Pac. 377.

Messrs. Canning & Geagan and *Mr. Spaulding*, Respondents, *pro se*, submitted a brief; *Mr. Spaulding* argued the cause orally.

If there was any failure to state a cause of action in the complaint as amended because it failed to aver that someone other than appellants had not performed their contract for them, the same was cured by the allegations of the answer. The answer admits that services were performed by respondents, but avers that the value of such services was only \$200, which sum one of appellants had offered to pay but payment was refused. This clearly shows that appellants conceded that no payment was ever made, and that the only controversy in this case at any time was the proper amount to be charged and paid for the services rendered. Such an admission cures any omission of allegation that might exist regarding the fact admitted. (21 Ruling Case Law, p. 492; *Ellinghouse v. Ajax Livestock Co.*, 51 Mont. 275, 282, L. R. A. 1916D, 836, 152 Pac. 481.) In addition, the answer specifically admits that appellants have not paid the amount claimed in the complaint nor any part thereof. This, coupled with the admission that a contract existed, clearly suffices to *prima facie* fix a liability in some amount on appellants. They could only escape that liability by showing that, notwithstanding this admitted breach of the contract, and their failure to pay, someone else had compensated respondents, and hence they were no longer liable. In other words, performance by someone else was wholly a matter of defense and not an essential allegation of the complaint.

But without regard to the foregoing, if there existed any insufficiency of the amended complaint by reason of its lack of allegation that no person other than appellants had performed their contract for them, such insufficiency was cured

by evidence introduced on the trial without objection that no payment of any amount by anyone had ever been made.

It is well settled in this jurisdiction that insufficiencies in a complaint even to the extent of failure to state a cause of action are cured by proof directed to the omitted matter introduced without objection. In such case the complaint is deemed amended to meet the proof and suffices to sustain the judgment. (*Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Arizona Eastern R. Co. v. Globe Hardware Co.*, 14 Ariz. 397, 129 Pac. 1104; *Smith v. Smith*, 38 Cal. App. 388, 176 Pac. 382; *Bush v. Bush* (Utah), 184 Pac. 823.)

At no place in the evidence in this case can it be found that there was any attempt on the part of John Lambros or any other person to evade military services, or to avoid the provisions of the Selective Service Act. John Lambros was an alien, and under the express provisions of that Act was not liable to be inducted into military service. The books abound in cases in which counsel appeared for parties claiming their rights to be exempted from military service under the Act. These are cases of alienage, and the attention of this court is very respectfully directed to a few thereof: *United States v. Finley*, 245 Fed. 871; *Angelus v. Sullivan*, 246 Fed. 54, 158 C. C. A. 280; *United States v. Kinkead*, 248 Fed. 141; *Ex parte Blazekovic*, 248 Fed. 327; *Summertime v. Local Board, Division No. 10*, 248 Fed. 832; *United States v. Mitchell*, 248 Fed. 997; *Halpern v. Commanding Officer of National Army etc. New York*, 248 Fed. 1003.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action by plaintiffs to recover of the defendants for legal services rendered them and for money expended at their special instance and request. The services rendered were for the purpose of establishing a claim by defendant John Lambros of exemption from military service in the army of the United States under the Selective Service Act. (Chapter 15, p. 76,

40 Stats. at Large (U. S. Comp. Stats. 1918, U. S. Comp. Stats. Ann. Supp. 1919, secs. 2044a-2044k, 9 Fed. Stats. Ann., 2d ed., p. 1136, *etc.*; Fed. Stats. Ann. (1919), p. 364, *etc.*).

The amended complaint alleges that the services were [1] rendered between September 1 and December 1, 1917; that they were of the reasonable value of \$1,000; and that the sum of \$100 was expended by plaintiffs in the payment of necessary traveling expenses, hotel bills, *etc.* It is further alleged "that the defendants have not paid the same nor any part thereof." Upon the overruling of their general demurrer, defendants answered, admitting that services were rendered by the plaintiffs Canning and Geagan reasonably worth not more than \$200, which sum the defendant John Lambros is ready and willing to pay, but the plaintiffs have refused to accept. All other allegations are denied. The jury returned a verdict for \$700, with interest at eight per cent per annum from December 1, 1917, when demand was made upon the defendants for payment. The cause is before this court on appeals from the judgment and an order denying defendants' motion for a new trial.

The defendants' brief contains several assignments of error, but only two questions are submitted for consideration: (1) Whether the court erred in overruling defendants' demurrer; and (2) whether the evidence is sufficient to justify the verdict.

It is contended that the complaint is fatally defective in that it fails to allege properly that the amount claimed by plaintiffs has not been paid. This contention is disposed of by the case of *Sanford v. Newell*, 18 Mont. 126, 44 Pac. 522, in which was considered a pleading similar to the one before us. Of it the court said: "The complaint is good as against general demurrer. It alleges the performance of certain services as attorneys for the defendants, that such services were performed at the special instance and request of the defendants, and that the services were reasonably worth \$500, and that defendants have not paid the same. These are allegations of fact upon which issues could be and were made." It is said by counsel that the allegations referred to are pregnant with

the admission that some person other than the defendants may have paid the amount before the action was brought. This contention has no merit, for the reason that there is no presumption that anybody other than the defendants themselves would, under any circumstances, assume to pay their debt.

The second contention proceeds upon the theory that it [2] appears from the evidence that the services were rendered for the purpose of aiding John Lambros, one of the defendants, to evade military service under the Federal Act referred to *supra*, and that an agreement to perform such services was void because it was in contravention of public policy. This contention is also without merit, for the reason that it appears that defendant John Lambros was an alien who had not declared his intention to become a citizen of the United States. Under the express provisions of the Selective Service Act *supra*, he was not liable to be inducted into military service. The provision of section 2 of the Act declares what persons were liable to service, as follows: "Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive." This provision necessarily excluded all aliens who had not declared their intention to become citizens. Since no person of this class was under obligation to enter the service, it was Lambros' privilege, if he chose to do so, to claim his exemption and to employ counsel to assist him in the preparation and presentation of his claim to the local exemption board having jurisdiction to determine it. The assertion of his claim by this defendant not being disloyal or in contravention of public policy it cannot be said that the plaintiffs were open to the charge of disloyal or unethical conduct in agreeing to represent him or in exacting from him compensation for their services.

The judgment and order are affirmed.

Affirmed.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

**BLINN ET AL., APPELLANTS, v. HUTTERISCHE SOCIETY
OF WOLF CREEK ET AL., RESPONDENTS.**

(No. 4,705.)

(Submitted September 27, 1920. Decided November 29, 1920.)

[194 Pac. 140.]

*Temporary Injunction—Motion to Dissolve—General Order
Dissolving—Effect—Appeal—Theory of Case—Contracts of
Sale—Real Property—Leases—Construction—Growing Crops
—Landlord and Tenant.*

Temporary Injunction—Effect of General Order Dissolving.

1. A general order of the district court dissolving a temporary injunction was in effect a finding in favor of defendants upon all material matters in dispute and conclusive on appeal, the evidence not preponderating against it.

Same—Does not Lie for What Purpose.

2. Injunction does not lie to oust one from and place another in possession of lands.

Contracts of Sale—Lands—How Enforceable Lease to Vendor may be Created.

3. Where a contract of sale of lands contained a provision for the execution of a lease of some of them by the buyer to the seller under terms embodied in the contract and to be thereafter reduced to a formal writing, an enforceable contract of lease was created though the writing was never executed.

Same—Leases—How to be Construed.

4. In construing the provisions for a lease, the courts will look to the practical construction given it by the parties themselves, rather than to the particular phraseology employed; hence where parties to a contract treated it as though it created the relationship of landlord and tenant, it will be treated as a lease and not as an option for one.

Same—Lands—Landlord and Tenant—Tenant at Will—Title to Crops.

5. Where the buyer of lands permitted the seller to remain in possession of certain portions of and cultivate them, and treated him as a tenant, the latter was at least a tenant at will and as such entitled to the crops sown and cultivated by him.

Temporary Injunction—Motion to Dissolve—Theory of Case—Appeal.

6. Where plaintiffs asked for the dissolution of a temporary injunction on the ground that they were and defendant was not entitled to possession of the lands in controversy and assumed the burden of showing that they were entitled to the injunction, they could not on appeal change their theory and urge that the trial court erred in not modifying and continuing it in force as to the lands held by plaintiff under an alleged lease.

Same—Motion to Dissolve—Question for Decision.

7. On motion to dissolve an injunction before trial upon the merits, the question before the court is whether, upon all the facts disclosed at the hearing, the court should have granted the injunction in the first instance.

Same—Motion to Dissolve—Assumption of Burden of Proof—Failure to Sustain Burden—Appeal—Theory of Case.

8. Where plaintiffs, on the hearing of defendant's motion to dissolve a temporary restraining order, voluntarily assumed the burden of showing that they were the owners in fee of lands, the crops growing on which defendant claimed under an alleged lease, and that therefore they were entitled to the injunction, they were responsible for uncertainty in the evidence respecting the issue, and in no position to urge on appeal that the injunction should have been modified instead of dissolved.

Same—Motion to Dissolve—Merits of Case not to be Determined.

9. On motion to dissolve a temporary restraining order, it is not the province of the district court, nor that of the supreme court on appeal from an order dissolving it, to determine finally any matter which may arise upon a trial of the merits of the case in which it was issued.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

ACTION by Edmund B. Blinn and another against the Hutterische Society of Wolf Creek, a corporation, and others. From an order dissolving a temporary injunction, plaintiffs appeal. Affirmed.

Messrs. Belden & De Kalb and Mr. Wm. M. Blackford, for Respondents, submitted a brief; Mr. H. Leonard De Kalb and Mr. Blackford argued the cause orally.

The appellants were not entitled to an injunction upon the facts. The action is not one of trespass. There is no allegation of any threatened injury to the freehold, or that respondents are insolvent. There is not any showing that the threatened injury cannot be amply compensated in damages. The crops of wheat and rye are emblements,—*fructus industriales*,—and “are regarded and treated as chattels personal.” (*Power Merc. Co. v. Moore Merc. Co.*, 55 Mont. 401, 177 Pac. 406.) Such being the facts, and we may say want of facts alleged, the appellants were not entitled to an injunction and the lower court properly dissolved it. (*Eisenhauer v. Quinn*, 36 Mont. 368, 122 Am. St. Rep. 370, 14 L. R. A. (n. s.) 435, 93 Pac. 38; *Kaufman v. City of Butte*, 48 Mont. 400, 138 Pac. 770; *Donovan v. McDevitt*, 36 Mont. 61, 92 Pac. 49.)

It is manifest all through the evidence that the respondent society was recognized by appellants at all times as the tenant

of these lands until they conceived the idea in the late spring of this present year of appropriating the wheat and rye crops to their own use. At this time they forcibly entered upon a portion of the leased lands in the possession of said respondent, and proceeded against its earnest protests to disc out a portion of the wheat and rye.

The reservation in the deed was unnecessary, for the lease term was provided for by the same instrument, pursuant to which the deed was made and delivered. It was a part of the same contract. The agreement for the lease is complete in every particular. The period of time for which it is to run, the names of the parties, the description of the land, what lands are to be cultivated to crops, and what used for pasturage, the terms and rental, provision for cancellation of lease by either party, settlement in event of cancellation, are all stated in exact detail. The entering into of the formal lease instrument was unnecessary, especially when the society was in possession of the leased premises by and with the knowledge and consent of the appellants and their co-owners and by them recognized as tenants from the time of the delivery of the sale and lease contract, and the society proceeded immediately in the performance of the lease terms. The minds of the parties had fully met in the contract signed and delivered. The lease which had been entered into upon the delivery of this contract could have served no other purpose than as evidence of the tenancy, and this was provided for explicitly in the contract itself. (*Long v. Needham*, 37 Mont. 408, 423, 96 Pac. 731; 5 Current Law, 666; *Pratt v. Hudson River R. R. Co.*, 21 N. Y. 305; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 43 Am. St. Rep. 757, 29 L. R. A. 431, 39 N. E. 75; *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903, 904; *Alexandria Billiard Co. v. Miloslawsky*, 167 Iowa, 395, 149 N. W. 504.)

When the society continued in possession of the premises covered by the lease agreement, and under that agreement, by and with the knowledge and consent of the appellants, a tenancy was created. (*Cheney v. Newberry*, 67 Cal. 125, 7 Pac. 444; *Neppach v. Jordan*, 15 Or. 308, 14 Pac. 353; 24 Cyc.

p. 884e; *Schlicht v. Callicott*, 76 Miss. 487, 24 South. 869; *Pugh Printing Co. v. Dexter*, 8 Ohio S. & C. Pl. Dec. 57.)

The authorities cited by appellants upon the question that as there was no reservation of the crops in the deed to appellants' agent, Greenwood, that the crops belonged to appellants, are not applicable to the instant case, for the reason that a tenancy was created under a contract of sale of the lands on which the crops were grown. Appellants' authorities cited apply to an absolute sale and transfer of the real property, free from any tenancy in the vendor and grantor.

If the lease contract had been entered into with one out of possession of the leased premises, and that party had never taken possession by and with the consent of the appellants and their co-owner, then the authorities cited by appellants upon the question that a contract for a lease vests no estate in a proposed tenant, and does not create the relation of landlord and tenant, would be applicable, but they are not applicable to the instant case when the society continued in possession of the leased premises by and with the knowledge and consent of the appellants and co-owners, and was then and thereafter recognized and continued to be recognized as tenant, and as such tenant proceeded to and did perform the terms of the lease agreement.

The crops for the ensuing year 1920, which had been seeded on the leased lands prior to the time of entering into the lease contract, passed under the terms of the lease agreement to the society, since they were not reserved by appellants. (*Emery v. Fugina*, 68 Wis. 505, 32 N. W. 236; *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721; *Edwards v. Perkins*, 7 Or. 149; *Tuttle v. Langley*, 68 N. H. 464, 39 Atl. 488; *Hosli v. Yokel*, 57 Mo. App. 622; 28 Cyc. 1071(e).)

Mr. T. F. McCue and *Mr. William J. Carr*, the latter of the Bar of Los Angeles, California, of Counsel for Appellants, submitted a brief, as well as one in reply to brief of Respondents; *Mr. Cue* argued the cause orally.

The record shows that the plaintiffs are the owners of the land. It follows as a legal presumption that they are, and

were during 'all times mentioned in this controversy, owners of the crops. (*Webster v. Sherman*, 33 Mont. 448, 458, 84 Pac. 878; 12 Cyc. 976; *Ellestad v. Northwestern Elevator Co.*, 6 N. D. 88, 69 N. W. 44.)

The executory contract between the Hutterische Society and D. S. Greenwood is merged in the deed that was executed by the society on January 16, 1920. The contract thereby became *functus officio*. (*Bryan v. Swain*, 56 Cal. 616; *Keator v. Colorado Coal etc. Co.*, 3 Colo. App. 188, 32 Pac. 857; *Davenport v. Whisler*, 46 Iowa, 287; *Thwing v. Davison*, 33 Minn. 186, 22 N. W. 293; *Wilson v. Randall*, 67 N. Y. 338.)

The defendants admitted and the record shows that there was no reservation of the crops in controversy in the deed, and as a matter of law the deed passed the title of the crops to the grantee Greenwood. In order for defendants to have any interest in the crops, they would have to show they were expressly reserved in the deed. (*Power Mercantile Co. v. Moore Mercantile Co.*, 55 Mont. 401, 408, 177 Pac. 406; *Fiske v. Soule*, 87 Cal. 313, 25 Pac. 430; *Garanflo v. Cooley*, 33 Kan. 137, 5 Pac. 766; *Coman v. Thompson*, 47 Mich. 22, 41 Am. Rep. 706, 10 N. W. 62; *Erickson v. Paterson*, 47 Minn. 525, 50 N. W. 699.)

A contract for a lease that is never executed or carried out gives no title to the lessee to crops raised by another upon the land proposed to be demised. In order for the defendants to succeed in this case, under the admitted facts in the record, the burden was on them to show title to the crops, and as there was no evidence in the entire record showing any title to the crops in controversy in the defendants, they were properly enjoined from harvesting or in any manner converting same to their own use; consequently the temporary injunction issued by the district court was erroneously dissolved, as there was no evidence to sustain any title to said crops in any of the defendants.

The provision in the executory contract is only an agreement to enter into a lease between the parties and amounts to an agreement to enter into a lease in writing. A mere contract for a lease vests no estate and does not create the

relation of landlord and tenant. (*Potter v. Mercer*, 53 Cal. 667; *People v. Gillis*, 24 Wend. (N. Y.) 201; *Jackson v. Delacroix*, 2 Wend. (N. Y.) 433; *McGrath v. City of Boston*, 103 Mass. 369.) "An agreement for a lease vests no estate in the proposed lessee although an action for its breach may be maintained by the other party against the one in default." (*Harrison v. Parmer*, 76 Ala. 157, 24 Cyc. 899; *Pittsburgh Amusement Co. v. Ferguson*, 100 App. Div. 453, 91 N. Y. Supp. 666.)

When the defendant society removed from the premises to South Dakota, taking with them their farm implements, machinery and personal property, and without tilling or cultivating the land during the growing season of 1920, the same constituted an abandonment and a forfeiture of their rights in the premises, and when the plaintiffs, as the evidence shows, took full possession of the premises the latter part of April and farmed it, it was a re-entry by the latter, which constituted a termination of any rights the defendants might have had in the premises. (*Myer v. Roberts*, 50 Or. 81, 126 Am. St. Rep. 733, 15 Ann. Cas. 1031, 12 L. R. A. (n. s.) 194, 89 Pac. 1051, 1052; Am. & Eng. Ency. of Law, 2d ed., 319; Taylor on Landlord and Tenant, sec. 535; *Samson v. Rose*, 65 N. Y. 411.)

The so-called agreement for a lease was not a mutual contract whereby one party agreed to lease and the other to accept a lease. It was a mere option for a lease. The society itself was under no obligation whatsoever. It could accept a lease or not, as it saw fit. In this the agreement differs fundamentally from the agreements considered in such cases as *Long v. Needham*, 37 Mont. 408, 423, 96 Pac. 731; *Pratt v. Hudson River R. R. Co.*, 21 N. Y. 305; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 43 Am. St. Rep. 757, 29 L. R. A. 431, 39 N. E. 75; and *Post v. Davis*, 7 Kan. App. 217, 52 Pac. 903, 904, cited by respondents, and in which the obligations of the parties were mutual and fixed.

The law is clear that in order for the respondent society to bring itself within the exception to the rule that such an agreement as this creates no tenancy and to establish a tenancy upon the same terms and obligations as though a lease

had, in fact, been made, it must show: (a) Entry under the agreement for a lease; and (b) That both parties treated and recognized the agreement for a lease as a present lease. This obviously must be so, for a party could not consistently ask a court to give an effect to the agreement, not expressed in its terms, which neither of the parties had given it and which was contrary to the assumed position of each; and (c) That the respondents have fully complied with all of the obligations that would have been imposed upon them if a lease had, in fact, been made. This, too, obviously must be so, for otherwise a party would be permitted to secure the benefits of the contract without performing the corresponding obligations.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On the day that this action was commenced, the affidavit of D. S. Greenwood was filed on behalf of the plaintiffs, and thereafter, on the complaint and that affidavit and without notice to the defendants, an injunction was issued restraining the defendants, their agents and employees, from entering upon the lands described in the complaint, and from harvesting, threshing or removing the crops of fall wheat and rye, and from interfering in any manner with the plaintiffs in their use and occupation of the lands. Immediately upon service of the injunction and before answer was made, or required to be made, the defendants appeared specially, and moved the court to dissolve the injunction. A hearing was had, documentary evidence and oral testimony introduced by the respective parties, and at the conclusion of the hearing an order was entered by the court dissolving the injunction, and plaintiffs appealed.

Upon the hearing these facts were established without controversy: On October 7, 1919, the defendant Hutterische Society, a corporation, and D. S. Greenwood, entered into a contract in writing, by the terms of which the society agreed to sell and convey to Greenwood certain lands, and to assign and transfer to him certain contracts for the purchase of addi-

tional lands. The lands were all particularly described by government subdivisions, and comprised approximately 10,000 acres located in Fergus county. The contract provided further that upon its execution Greenwood should lease to the society certain of the lands, particularly described, the farming lands for a crop rental of one-third delivered in the elevator, and the grazing lands for a cash rental of \$1,500 per annum, the first annual payment to be made on or before November 1, 1920. A limitation upon the duration of the lease was fixed, and the conditions and circumstances under which either party might terminate the lease before the expiration of the term were set forth in detail. The formal lease was never executed.

At the time the contract was signed on October 7, 1919, large areas of the land had been seeded to fall wheat by the society, and upon other large areas fall rye was growing. On January 16, 1920, the society conveyed the lands first mentioned above to Greenwood by quitclaim deed. These lands had been held by the society for the use and benefit of its members in Fergus county, who composed a colony of Mennonites. The number of persons in the colony is not given; but some time during the winter following, or in the early spring of 1920, all members, excepting defendant Stahl, the managing agent of the society, and defendant Walters and his family, removed to South Dakota, taking with them most of the livestock and farming utensils.

About April 23, 1920, Greenwood went upon and plowed up portions of the lands which had been in fall wheat and rye, and reseeded the same to spring crops, and thereafter plowed and planted other portions of the farming lands which were to be included in the lease, and relet to third parties still other portions to be summer fallowed. About June 15, 1920, Greenwood conveyed to these plaintiffs all the lands which had been conveyed to him by the deed of January 16. When the fall wheat and rye were about to mature in the summer of 1920, plaintiffs and the society respectively prepared to harvest the crops. The society's agent first commenced the actual work of harvesting, and plaintiffs instituted this action and secured the injunction. It is conceded that

all of the rye, and at least part, if not all, of the wheat, were produced upon the lands which were to be included in the lease.

In addition to these facts, established without controversy, the court had before it upon the hearing evidence introduced by the plaintiffs which tended to prove that the rye was a volunteer crop; that the crops upon the ground reseeded had been winter-killed to such extent that good husbandry required that the ground be reseeded to spring crops; that the society had not done anything toward reseeding, or preparing other portions of the lands for spring crops, and was not prepared to summer fallow the remaining portions. The court also had before it evidence, introduced by the defendants, which tended to prove that the fall rye had been planted by the society, and was not a volunteer crop; that after the contract of October 7, 1919, was signed, the society planted about 130 acres of the fall wheat now in controversy; that the right to receive the lease was a material part of the consideration passing to the society for the sale of the lands at the price agreed upon; that no part of the fall wheat or rye was winter-killed to such extent as to require that the ground be reseeded; that the society was in the actual and exclusive possession of all the lands mentioned on October 7, 1919, had been in such possession for several years previously, and continued in such possession of the lands to be included in the lease up to the time of the hearing, except that over their protests and objections, plaintiffs had plowed up and reseeded the ground heretofore referred to, and except, further, that by an executed oral agreement, entered into in the spring of 1920, Greenwood had taken over the grazing lands, and had released defendant society from the payment of the rental; and had relet the portion to be summer fallowed to third parties, and had released the society from doing that work; that defendants had made preparation to do all the work required to be done by the society, and had ample equipment for that purpose, or had contracted for the work to be done.

The court also had before it the complaint in this action which alleges that these defendants continued in the posses-

sion of the lands from the date of the deed—January 16, 1920—to the date upon which the action was commenced, were then actually in possession, and threatened to continue, though it is alleged that their possession was unlawful. The court also had before it the affidavit of Greenwood, made on behalf of the plaintiffs, to the effect that he had read the complaint, “and that the matters therein stated are true.”

It was peculiarly the province the district court to pass [1] upon the credibility of the witnesses and ascertain what were the facts. The general order dissolving the injunction is in effect a finding in favor of defendants upon all material matters in dispute, and is conclusive upon this court, since we cannot say that the evidence preponderates against such finding.

For the purpose of simplification, these plaintiffs will be treated as the purchasers under the contract of October 7, 1919, since it appears that Greenwood was acting for them in all his negotiations, and the society will be treated as sole defendant, since it is apparent that Stahl and Walters are nominal parties only, joined in this action because they were the representatives of the society actually upon the lands when this action was commenced.

Upon the facts found, this case was presented to the lower court: The plaintiffs, purchasers, never were in the actual or exclusive possession of the lands to be covered by the lease. The society, the vendor, was in actual and exclusive possession when it planted the crops in controversy and continued in possession of the lands upon which those crops were growing until the injunction was issued and served. The practical [2] effect of the injunction as issued was to oust the society from its possession and install the plaintiffs in possession, and for such a purpose injunction is not an available remedy. (*Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. Ed. 368, 12 Sup. Ct. Rep. 659; *Black v. Jackson*, 177 U. S. 349, 44 L. Ed. 801, 20 Sup. Ct. Rep. 648 [see, also, *Rose's U. S. Notes*]; *Yellow Pine Export Co. v. Sutherland-Innis Co.*, 141 Ala. 664, 37 South. 922; *Hall v. Henniger*, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6; *State Road Bridge Co. v. Circuit Judge*,

143 Mich. 337, 106 N. W. 394; *Stout v. Williams*, 203 Pa. 161, 52 Atl. 169.)

Counsel for plaintiffs, who were not of counsel at the time of the hearing, insist that plaintiffs secured possession when they went upon the land to do the reseeding and other work, and continued their possession thereafter until ousted by the society, when it commenced harvesting the crops, and, as we understand their contention, it is that the case made is one of threatened destruction of plaintiffs' property by a willful trespasser, unable to respond in damages, and is within the rule recognized in *Lee v. Watson*, 15 Mont. 228, 38 Pac. 1077, and *City of Bozeman v. Bohart*, 42 Mont. 290, 112 Pac. 388. In so far as that contention involves the assumption that defendant society was ever out of possession, it is irreconcilable with the allegations of the complaint referred to above. We are not disposed to be hypercritical, however, and shall review the several other contentions presented in appellants' brief.

It is urged that the relation of landlord and tenant never existed between the plaintiffs and the society, but that position cannot be maintained for three reasons: (1) If the contract [3] of October 7, 1919, contained the terms which were to be included in the lease, a valid, enforceable lease was thereby created, even though the parties contemplated that their agreement should be reduced to a more formal document (*Long v. Needham*, 37 Mont. 408, 96 Pac. 731), and, so far as disclosed by this record, the contract for a lease did comprehend all that the parties intended to include in the lease. The suggestion now made by appellants that the contract of October 7, 1919, provides only for an option for a lease cannot be urged seriously. The agreement for a lease is bilateral, and its obligations reciprocal. (2) The parties treated the contract as [4] though it created the relationship of landlord and tenant. In construing the provision for a lease the courts will look to the practical construction given it by the parties themselves, rather than to the particular phraseology employed. (*Helena L. & Ry. Co. v. Northern Pac. Ry. Co.*, 57 Mont. 93, 186 Pac. 702.) The society was insisting at all times that it was right-

fully in possession, and was claiming the crops in controversy, and it is only upon the theory that it was a tenant that such claims could be made. On the other hand, Greenwood testified to numerous conversations which he had with Stahl during the early spring of 1920, all relating to the obligations imposed upon the society, and in that connection, among other things, he testified that he recognized the right of the society to a lease according to the terms set forth in the contract of October 7, 1919, until he saw that it was not going to farm the land as it had agreed to do, and that in March or April, 1920, he told Stahl that he would prefer to have the pasture lands to run his own stock upon, if Stahl would let him have them, and, if the society wanted to be released from its obligation to pay rent for such lands, it must complete the other term of the lease, *viz.*, cultivate the farming lands. If the relation of landlord and tenant did not then exist between them, the society owed to plaintiffs no duty whatever to farm the lands or do any other work upon them, had no interest in the pasture lands to surrender, and owed no rental from which it could be released. (3) Assuming that the trial court found [5] the facts to be as indicated by the undisputed evidence and the testimony introduced by the society, the society was at least a tenant at will. (*Power Mercantile Co. v. Moore Mer. Co.*, 55 Mont. 401, 177 Pac. 406.) It is not made certain by the contract of October 7, 1919, that the society was called upon to do any work, other than the work it had done and the work it was undertaking to do when restrained by the injunction.

Again, it is contended that the entire contract of October 7, 1919, was merged in the deed of January 16, 1920, and that any right which the society had to lease was conveyed or surrendered. The deed referred to was not introduced in evidence, is not before us, and is not subject to construction upon this appeal; but that it was never the intention of the parties that the deed should have such effect is demonstrated by the evidence just recited above, and by other evidence of a similar character. As late as April 13, 1920, Greenwood wrote to Mr. Johnson of Lewistown, who then had some interest in the

property with plaintiffs, and, referring to a conversation which he had with Stahl on the day previously, among other things, said: "I will draw up a lease contract that will cover all the points that a lease should contain and as agreed upon at the time the purchase of the land was made, and I am sure the Mennonites will not sign it, as they will not bind themselves to do anything," *etc.*

Finally, it is contended that it cannot be determined from [6-7] the evidence whether all of the fall wheat in controversy, 550 acres, was produced upon the lands to be included in the lease, and therefore the court erred in dissolving the injunction, and should have modified it and continued it in force to protect plaintiffs in the possession of the lands not to be included in the lease, and the crops produced upon them.

Upon the hearing, plaintiffs assumed the burden of proof, and, in addition to the proof necessary to establish the fact that they were the owners of the land in fee, offered evidence to prove, and undertook to prove, that the society was not entitled to possession under the contract of October 7, 1919. [8] In other words, they assumed the burden of proving that they were entitled to the injunction which had been issued at their instance and request. Having voluntarily adopted that theory in the trial court, they will not be heard on appeal to urge a different one, and could not do so successfully. On motion to dissolve an injunction before trial upon the merits, the question before the court is whether upon all the facts disclosed at the hearing the court should have granted the injunction in the first instance. (*Lawrence v. Lawrence* (Sup.), 172 N. Y. Supp. 146.) If the evidence leaves it uncertain whether any portion of the wheat in controversy was produced upon lands which were not to be included in the lease, the plaintiffs are responsible for the uncertainty under the theory upon which the hearing proceeded.

Upon this appeal we have assumed, without deciding, that the complaint states a cause of action in ejectment, and that the Greenwood affidavit is sufficient to warrant the trial court acting upon the *ex parte* application for an injunction. It was [9] not the province of the district court, and it is not the

province of this court, to determine finally any matter which may arise upon a trial of the merits. These observations are to be understood only as reflecting our views upon the question of plaintiffs' right to an injunction as disclosed by the evidence presented at the hearing.

The order dissolving the injunction is affirmed, and the order of this court, continuing the injunction in force until the hearing and determination of this appeal, is vacated.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

LEWIS, APPELLANT, v. LAMBROS, RESPONDENT.

(No. 4,443.)

(Submitted November 15, 1920. Decided November 29, 1920.)

[194 Pac. 152.]

Sales—Personal Property—Failure of Title—Damages—Executory and Executed Contracts—Stipulations—Failure to Make Payments—Effect on Title.

Stipulations—Binding on Courts and Parties.

1. Courts, as well as the parties entering into it, are bound by the provisions of a stipulation that certain alleged facts shall be deemed proven, so long as it remains in force; hence admission of evidence having a tendency to disprove what was by the stipulation judicially admitted, was error.

“Executed” and “Executory” Contracts—Definition.

2. An “executed contract” is one where nothing remains to be done by either party, and conveys a chose in possession; while an “executory contract” is one in which a party binds himself to do or not to do a particular thing in the future, conveying a chose in action.

Contracts—Executed and Executory.

3. A contract may be partly executed and partly executory, and may be executory as to one party and executed as to the other.

Sales—Bill of Sale not Necessary to Validity.

4. A bill of sale is not necessary to make a valid sale of personalty.

Validity of stipulations making rules of evidence, see note in 8 Am. St. Rep. 921.

Same—Executed Contract, When.

5. Sale of personalty consisting of a house and contents (without the lot on which it was situate) on deferred payments, the agreement not containing any provision for forfeiture of the buyer's rights on failure to make payments or for reservation of title in the seller, *held* to have been an executed, and not an executory contract.

Same—Failure to Make Future Payments—Effect on Title.

6. Failure to make payment for personal property sold on the installment plan does not of itself restore title to the vendor.

Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

ACTION by C. U. Lewis against P. D. Lambros. From a judgment of nonsuit, and from an order denying his motion for new trial, plaintiff appeals. Reversed.

Mr. John A. Shelton, for Appellant, submitted a brief and argued the cause orally.

Messrs. Walker & Walker and *Mr. C. S. Wagner*, for Respondent, submitted a brief; *Mr. Thomas J. Walker* argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

The complaint in this action alleges that on the twenty-fourth day of July, 1916, for a consideration of \$3,000 paid by the plaintiff to the defendant, defendant sold and delivered to plaintiff a certain one-story brick building in Butte, together with a stock of confectionery, furnishings and furniture therein contained; that at the time of such sale and delivery the defendant was in the possession of the said property so sold, and represented to the plaintiff that he was the owner of said building, but not of the land on which the same was situated, and that plaintiff relied upon, and was induced to buy the said property because of, such representations. It is further alleged that the defendant on the date of sale had no title to said building, and has not since acquired the same; that on or about the thirty-first day of December, 1917, plaintiff was deprived of the possession of the building by the rightful owner; and that the building was then of the value of

\$3,000, for which sum plaintiff claims damages. The answer is a general denial.

At the commencement of the trial a stipulation signed by the respective attorneys for the parties, reading as follows, was introduced in evidence: "It is hereby stipulated and agreed by and between the plaintiff and defendant herein that on the trial of the above-entitled cause it shall be deemed to have been proved that on the 24th day of July, 1916, defendant P. D. Lambros did not own and had no title to that certain building situated at No. 125 West Park street, Butte, Mont., or any part thereof, which building was then and there sold by him to the plaintiff, C. U. Lewis, and that the said defendant has not acquired any title or interest in or to the said building, and that said building was then and is now owned by S. V. Kemper and J. W. Kemper. The defendant may object to proof of said facts or any of them upon ground of irrelevancy, inadmissibility, and incompetency, but waives all right to object to the manner of proof of said facts or any of them."

Plaintiff offered testimony as to the value of the building as of the date he alleged he was dispossessed of the same; and, after testifying that he took possession on the twenty-fourth day of July, 1916, stated that he continued in possession until said December 31, 1917, when he surrendered possession to one Kemper, the rightful owner thereof. On August 18, 1916, plaintiff executed and delivered to a Butte bank his promissory note for \$3,000, which note was also signed or guaranteed by defendant. The proceeds derived from the negotiation of such note were paid to defendant.

Upon cross-examination certain documents, identified as Defendant's Exhibits Nos. 2 and 3, were proven, over plaintiff's objection. There was also cross-examination of the plaintiff as to the nature of the transaction and the date and conditions of sale. Exhibit No. 2 was an agreement of the parties, dated August 18, 1916, and recites that a bill of sale had been that day executed by the defendant and placed in escrow in the bank of Butte, that the plaintiff should pay monthly, during the life of the agreement, the sum of \$200

to be credited upon the note executed by the parties in favor of said bank, and that, when the entire consideration of \$3,000, together with interest thereon, should have been paid, the said bank would deliver to plaintiff such bill of sale. Exhibit No. 3 was a bill of sale, in the usual form, and of the same date as the agreement, and contained an express warranty of title. Payments were thereafter made to the bank upon the note, on which, at the time of the trial, there was a balance unpaid of \$1,500, with interest. Plaintiff testified in effect that he ceased making payments because of the claim of ownership of Kemper. The plaintiff contended that the sale itself took place on July 24, 1916, and that the negotiations were oral. At the conclusion of plaintiff's evidence, the court granted a nonsuit. From the judgment entered thereon and from an order denying a new trial, the plaintiff has appealed.

It is apparent that the parties have at other times assumed positions inconsistent with those now maintained. In an action against the bank and this defendant (which had been dismissed as to this defendant) plaintiff alleged an executory contract of date August 18, 1916, failure of consideration on the part of defendant, partial performance by plaintiff, and asked for rescission and return of the money paid under the contract (Exhibit 2)—a position entirely opposed to the one now assumed. To that complaint defendant made answer, entirely at variance with the contention now adopted, alleging a sale to plaintiff and payment by plaintiff to defendant of the entire consideration of \$3,000 on said date. However inconsistent these assertions of the parties may be, such inconsistencies could bear only upon the weight to be given their testimony in the present action. But, so far as this case is concerned, it is agreed between them by the stipulation that the sale was effected on July 24, that there was a failure of consideration in that defendant had no title to convey, and that title was actually in another person, leaving the only remaining issue the question of damages.

The plaintiff alleges that he purchased the property on [1] July 24. By the stipulation defendant admits this fact. What relevancy, then, the agreement of August 16, 1916, may

have, it is difficult to ascertain. Its introduction only tended to disprove what the parties had said was to be deemed proven. This court, as well as the trial court, must be bound by the stipulations of the parties. Defendant, having agreed to the truth of certain facts, is in no position to later deny them in the same action, so long as the stipulation remains in force. It must be presumed that the stipulation speaks the truth. As said by Mr. Chief Justice Brantly, in *Spaulding v. Stone*, 46 Mont. 483, 129 Pac. 327: "The purpose of such a stipulation is to relieve the parties from the necessity of introducing evidence as to the ultimate fact covered by it. If the fact is material, the court is, as to it, bound by the stipulation. It amounts to a special finding. (Rev. Codes, sec. 6769.)" (See, also, *Phillips v. Coburn*, 28 Mont. 45, 72 Pac. 291.)

The rule as stated in Wigmore on Evidence, sections 2588 and 2590, commends itself to our judgment:

"An express waiver made in court or preparatory to trial by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—i. e., ceremonial or formal—or judicial admission, and is, in truth, a substitute for evidence, in that it does away with the need of evidence.

"This judicial admission is sharply marked off from the ordinary or quasi admission, which indeed does not deserve to bear the same name. The latter is merely an item of evidence, available against the party on the same theory on which a self-contradiction is available against a witness. The distinctions between the two have already been examined (*ante*, secs. 1048, 1057). It is enough to note that, as to the effect, the latter is not conclusive; while, as to its form, it may be either implied or express, and need not be either written or made in open court." (Sec. 2588.)

"The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, i. e., the prohibition of any further dispute of the fact by him,

and of any use of evidence to disprove or contradict it." (Sec. 2590.)

It is the position of appellant that the agreement of August 18, 1916, was an executory contract for the sale of the building, and that plaintiff, not having completed performance of the terms to which he had agreed, should not be allowed to assert a claim for damages against defendant, and that, if there was a failure of consideration, his action is in rescission and for return of the moneys paid, with interest; citing *Peuser v. Marsh*, 218 N. Y. 505, Ann. Cas. 1918B, 913, and note, 113 N. E. 494; *Bunday v. Columbus Mach. Co.*, 143 Mich. 10, 5 L. R. A. (n. s.) 475, and note, 106 N. W. 397.

An executed contract is one where nothing remains to be [2] done by either party. An executory contract is one in which a party binds himself to do or not to do a particular thing in the future. An executory contract conveys a chose in action; an executed contract a chose in possession. A [3] contract may be partly executed and partly executory and may be executory as to one party and executed as to the other. (13 C. J. 245.)

Even were the contract admissible, we think, however, in view of the stipulation—there being no plea of mistake nor attempted reformation—it was a mere agreement to deliver to plaintiff evidence of his title, and not the property itself. Nowhere does it appear that defendant reserved title in himself, nor does the agreement contain any provision for forfeiture of plaintiff's rights should he fail to make the payments agreed upon.

A bill of sale is not necessary to make a valid sale of personalty. In fact, it is a matter of common knowledge [4] that the vast bulk of sales of personal property is not accompanied by any written evidence thereof.

If defendant sold on July 24, the fact that payment was [5, 6] to be made in the future did not necessarily make the sale itself executory any more than would the sale of goods on credit. In such cases title has fully passed, and all that remains to be done is to make payment, and failure to do so does not of itself restore title to the vendor. In our view of

the record, the sale of the property was complete on July 24, 1916, and the transaction as to sale was not in the nature of an executory contract.

Plaintiff made a *prima facie* case, and the motion for nonsuit should have been denied.

The judgment and order appealed from are reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

BOX ELDER LIVESTOCK CO., RESPONDENT, v. GLYNN
ET AL., APPELLANTS.

(No. 4,222.)

(Submitted November 17, 1920. Decided December 1, 1920.)

[193 Pac. 1117.]

*Ejectment — Boundaries — Parol Agreements — Statute of
Frauds—Public Lands—Ratification—Offer of Proof.*

Boundaries—Parol Agreements—Validity—Statute of Frauds.

1. An oral agreement between coterminous owners establishing a boundary line between their respective lands is not within the statute of frauds as conveying the fee, where at the time of entering into it they were in doubt or ignorance of the true line and a real controversy as to it existed between them.

Same—Public Lands—Parol Agreement Between Entryman Before Patent—Effect.

2. An agreement of the nature of the above between an entryman upon public lands before patent and an adjoining owner was binding upon the former and those claiming under him.

Same—Offer of Proof—Improper Rejection.

3. An offer of proof, in an action in ejectment, tending to show not only a parol agreement fixing a boundary line between an entryman before patent and an adjoining owner, but also ratification thereof by the entryman's successor in interest and defendant after final proof and both before and after patent, held to have been improperly rejected.

*Appeal from District Court, Cascade County; H. H. Ewing,
Judge.*

On effect of compromise agreement locating division line at place known not to be the true boundary, see note in 10 L. R. A. (n. s.) 610. Practical location of boundaries by agreement of parties, see note in 110 Am. St. Rep. 682.

ACTION by the Box Elder Livestock Company against Thomas F. Glynn and another. Judgment for plaintiff and defendants appeal. Reversed.

Cause submitted on briefs of Counsel.

Mr. John W. Stanton, for Appellants.

Messrs. Cooper, Stephenson & Hoover, for Respondent.

MR. JUSTICE HURLY delivered the opinion of the court.

Action in ejectment to recover possession of two tracts of land, one containing 11.3 acres, and one 46.4 acres, both in section 20, township 19 north, range 6 east, M. M., for which land plaintiff has record title.

The section referred to, by reason of inaccuracies in the government survey, contains between 800 and 900 acres of land, instead of the usual 640. Upon the trial plaintiff introduced in evidence conveyances of the south half of the southwest quarter, section 20, above, as follows: A quitclaim deed dated May 25, 1900, from one Van Bergen to Jennie Reese, reciting it to be the intention to transfer all of grantor's interest in the land embraced in his desert entry therefor, of date November 1, 1898; a similar deed, dated November 5, 1902, from Reese to one Susan Hanley; patent from the United States to Hanley, dated June 9, 1910; warranty deed from Hanley to Reese, dated January 21, 1903; warranty deed from Reese to A. Nathan, dated January 10, 1903; and warranty deed from Nathan to plaintiff, dated June 30, 1914. Defendants thereupon stipulated that the 11.3 acres above described are within the boundaries of the south half of the southwest quarter, and that the 46.4 acre tract is within the boundaries of the west half of the southeast quarter of said section. The plaintiff then offered in evidence a plat of the section, made from a survey showing the lands in dispute and their location with reference to the legal description, and rested its case. Defendants thereupon called one Sinclair, the surveyor who made the plat above, who explained the survey so made.

Mrs. Bert Colvin was then called by defendant, and testified that her name was formerly Jennie Reese. Defendants' counsel sought to show by her that during the time she had possession of the land under said desert entry there was a disagreement between her and defendant Glynn respecting the boundary line between her entry and the lands of Glynn to the north; that the government corners could not be located; that the survey was irregular, and that it was believed the section contained between 800 and 900 acres; that one French, an experienced and competent surveyor, surveyed the land and placed monuments thereon, according to which the lands in controversy form no part of the south half of the southwest quarter nor the west half of the southeast quarter of the section, and that thereupon, in 1900, an agreement was made between Glynn and Reese whereby they agreed to accept the survey so made by French as true and correct and as establishing their boundaries and that Reese then erected a fence along the south and east lines of the smaller tract in controversy, and along the south line of the other tract, and that at all times thereafter she and said Glynn accepted said agreement as binding and said fencing as being on the true boundary line between their respective lands; that ever since—sixteen years—defendant Glynn has been in the open, notorious, exclusive and adverse possession of the land lying north of said fences, being the land in controversy, during which time he has occupied said land by virtue of said agreement; that, after the assignment of said entry to said Susan Hanley, she likewise accepted and acted upon said agreement, and that, after the reconveyance by Hanley to Reese, said Reese again recognized and abided thereby; that after final proof, but before patent, said Reese conveyed the land to Nathan and he, before purchasing examined the land, said Reese pointing out the corners and fences, informing him that the fences in question were upon the boundaries, and that during the time he held possession, a period of about eleven years, the fences were regarded as the boundary lines; that said agreement so made by said Reese and Glynn was acquiesced in by him and defendant Glynn; and that again, five years before the trial,

said Reese and said Nathan again went over said tract, when he again acquiesced in and ratified the agreement between Reese and Glynn.

This testimony was objected to by plaintiff on the ground that the agreement sought to be established was made before patent and at a time when Reese had no authority to make a valid agreement affecting title to the land, which objection was sustained. Defendants also contended that plaintiff's action was barred by the statute of limitations, but it has expressly abandoned that defense upon this appeal.

The court directed verdict for the plaintiff and rendered judgment thereon, from which defendants have appealed.

Assuming that defendants were able to prove the facts [1] embraced in the offer of proof, the proof would show that the section is irregular in size and shape, and that the quarter corners were not marked and could not be definitely ascertained; that there was a disagreement as to the location of the boundary lines between the adjoining owners or claimants, which could not be located in the ordinary manner.

In an opinion written by Mr. Commissioner Callaway it was said: "Appellant contends that a verbal agreement between coterminous proprietors of land establishing a line between their respective estates, and that such a line shall become a division line, is invalid, as being within the statute of frauds. This depends altogether upon the circumstances. In *Galbraith v. Lunsford*, 87 Tenn. 89, 1 L. R. A. 522, 9 S. W. 365, the court said: 'If, with full knowledge of the true line, another be fixed by verbal agreement, such agreement is within the statute of frauds, and consequently void; but, where there is doubt or ignorance as to the true locality of the line, a parol agreement fixing the line between adjoining owners is not within the statute, and, where satisfactorily established, will be enforced by the courts, notwithstanding it may afterwards be demonstrated that the agreed line was erroneously fixed; and such adjustment may be shown as well by circumstances and recognition as by direct evidence of a formal agreement, where parties have acted thereon. * * * It is well settled that where the owners of contiguous lots by parol agreement

mutually establish a dividing line, and thereafter use and occupy their respective tracts according to it for any period of time, such agreement is not within the statute of frauds, and it cannot afterwards be controverted by the parties or their successors in interest. * * * It is the policy of the law to give stability to such an agreement, because it is the most satisfactory way of determining the true boundary, and tends to prevent litigation. * * * The above quotations state the law applicable to this case.” (*Hoar v. Hennessy*, 29 Mont. 253, 74 Pac. 452.) To the same effect is the decision in *Myrick v. Peet*, 56 Mont. 13, 180 Pac. 574, though, upon the facts presented, it was there held that neither party claimed more than to the true line, and that occupancy was merely subject to future ascertainment of the proper location of the boundary, under the rule there cited that “If the parties, from misapprehension, adjust their fences, and exercise acts of ownership, in conformity with a line which turns out not to be the true boundary, or permission be ignorantly given to place a fence on the land of the party, this will not amount to an agreement, or be binding as the assent of the parties.” Here, however, it is contended that the boundaries could not be determined. Such being the case, for the purpose of preventing litigation, under the rule cited in *Hoar v. Hennessy*, *supra*, the agreement, even in parol, if the parties had legal authority to deal with the land, would be valid and binding.

Where there is a real controversy as to the boundaries, an [2] agreement between the contesting claimants settling the same is not within the statute of frauds (cases *supra*), nor are they looked upon as in any way conveying the fee. As said by the supreme court of the United States in *Boyd's Lessee v. Graves*, 4 Wheat. 514, 4 L. Ed. 628 [see, also, Rose's U. S. Notes]: “It is not a contract for the sale or conveyance of lands. It has no ingredient of such a contract. There is no *quid pro quo*; and the courts do not consider it as a conveyance of title from one person to another. It was merely a submission of a matter of fact, to ascertain where the line would run on actual survey, beginning at a place admitted and acknowledged by the parties to be a boundary, where the

line must begin." If, therefore, such agreements are not in the nature of sales or transfers, it would seem that there could be no serious contention that an entryman upon public lands could make such agreement, binding as to himself and those claiming under him.

Were this question urged by one who based his right [3] independently of any claim through Reese, a different situation would be presented. Here, however, plaintiff claims through the title of Reese. When it purchased and when each of the purchasers acquired title (if defendant should establish by competent evidence the facts asserted in the offer of proof) defendant Glynn was in the actual, open, notorious and exclusive possession of the lands in controversy, and each ratified such agreement. In addition, Glynn's occupancy effectively charged such purchasers with notice of his claim thereto.

Even if it be conceded that an agreement respecting boundaries, made before final proof, would not be binding, the offer of proof goes further than to show merely an agreement before final proof, and includes an offer of evidence tending to establish ratification after final proof, both before and after patent, at times when the right to convey could not be questioned. In our opinion, the tendered testimony should have been received.

The judgment is reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, MATTHEWS and COOPER concur.

STATE, RESPONDENT, v. SMITH, APPELLANT.

(No. 4,450.)

(Submitted November 17, 1920. Decided December 1, 1920.)

[194 Pac. 131.]

*Criminal Law—Sedition—Information—Insufficiency—How
Question Raised—Uncertainty of Language Fatal Defect.***Criminal Law—Information—Insufficiency—Methods of Objection.**

1. Under section 9208, Revised Codes, the objection that the facts stated in an information do not constitute a public offense may be taken either by demurrer, or at the trial under a plea of not guilty, or after the trial in arrest of judgment.

Same—Information—Interpretation—Inferences not Permissible.

2. In interpreting the language used in an information, inferences, however reasonable, cannot be drawn upon to aid the pleader, and no presumption can, for this purpose, be indulged, since the legal presumption in a criminal case is that defendant is innocent.

Sedition—Information—Uncertainty—Fatal Defect.

3. *Held*, that an information charging sedition in that defendant feloniously stated that "she wished the people would revolt and that she would shoulder a gun and get the president the first one," was fatally defective for failure to meet the degree of certainty required by section 9156, Revised Codes, it being conjectural whether defendant meant the people or the president of the United States, or the people or president of any other country.

Same—Information—Seditious Language—May be Charged, How.

4. An information charging one with the utterance of seditious language need not set forth the exact words used by defendant, the pleading being permitted to allege that the language used was "in substance as follows."

Appeal from District Court, Custer County; Chas. A Taylor, Judge.

JANET SMITH was convicted of sedition, and from the judgment of conviction and from an order denying a motion for new trial, she appeals. Reversed and remanded.

Mr. Sharpless Walker and *Mr. W. C. Packer*, for Appellant, submitted a brief, and one in reply to that of Respondent; *Mr. Walker* argued the cause orally.

The language charged in the information is insufficient in itself to constitute the crime of sedition; it contains nothing in explanation of the utterances alleged to have been made. It is not alleged that the defendant said she wished to goodness the people of the United States or of any other country would

revolt, nor that she said she would shoulder a gun and get the president of the United States, or President Wilson, the first one. The terms "people" and "president" are very general terms, and when used without any qualifications, are not sufficiently definite to conform to the rules of pleading in criminal cases.

We contend, therefore, that the term "president" is such a general term that it cannot be understood, when standing alone, to apply to the president of the United States any more than to the president of some other country or some organization. Furthermore, even though the information had charged the defendant with having made the utterance that she would get the president of the United States the first one, such utterance would not constitute sedition under the sedition laws of the state of Montana. In this connection we desire to call the court's attention to the fact that the president of the United States is not mentioned in the Montana sedition law, nor in the Federal Sedition Act. In the Act of Congress approved July 14, 1798, it was made a crime to write, print, utter or publish, or cause or procure to be written, printed, uttered or published, or to knowingly, willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the president of the United States, with intent to defame the said government or either house of said Congress, or the said president, or to bring them or either of them into contempt or disrepute, or to excite against them, or either or any of them, the hatred of the good people of the United States, *etc.* The president of the United States was not included in either the federal or state sedition law now in effect, so that it is apparent that it was not the intent of the legislature to include within the provisions of the sedition laws the making of scurrilous or contemptuous utterances against the president of the United States.

The information must be direct and certain as regards the party charged, the offense charged, and the particular circumstances of the offense charged, when they are necessary to con-

stitute a complete offense. (Sec. 9149, Rev. Codes; *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362; *State v. Eddy*, 46 Or. 625, 81 Pac. 941, 82 Pac. 707; *People v. Allison*, 25 Cal. App. 746, 145 Pac. 539; *Stout v. Territory*, 2 Okl. Cr. 500, 103 Pac. 375; *State v. Flower*, 27 Idaho, 223, 147 Pac. 786; *Commonwealth v. Briggance*, 3 Ky. Law Rep. 623; *Lane v. State*, 151 Ind. 511, 51 N. E. 1056; *Zinn v. State*, 68 Tex. Cr. 149, 151 S. W. 825.) An indictment must advance its position of fact in absolute form, and not leave them to be collected by inference and argument. (*Commonwealth v. Whitney*, 71 Mass. (5 Gray) 85.) All indictments require direct, positive and affirmative allegation of every point to be proved. (*United States v. Post*, 113 Fed. 852.)

An indictment or information in a criminal prosecution for libel or slander must not only set out the defamatory matter *verbatim*, but the indictment or information must on its face profess to give the very words complained of, and we contend that the same rule applies to prosecutions for sedition. (25 Cyc. 577; *State v. Townsend*, 86 N. C. 676; *Commonwealth v. Sweeney*, 10 Serg. & R. (Pa.) 173; *State v. Walsh*, 2 McCord (S. C.), 248; *Commonwealth v. Wright*, 1 Cush. (Mass.) 46, 63; *State v. Goodman*, 6 Rich. L. (S. C.) 387, 60 Am. Dec. 132; *Morris v. State*, 109 Ark. 530, Ann. Cas. 1915C, 925, 160 S. W. 387; Townshend on Slander and Libel, sec. 329.)

Mr. S. C. Ford, Attorney General, and *Mr. Otto Gerth*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Gerth* argued the cause orally.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On October 11, 1918, Janet Smith was convicted of the crime of sedition and sentenced to an indeterminate term of not less than five nor more than ten years' imprisonment. She appeals from the judgment and from an order denying her a new trial.

The information herein charges that "At the county of Custer, state of Montana, on or about the first day of June, 1918, and during a state of war existing between the United

States and Germany, the defendant did, unlawfully, willfully, wrongfully, seditiously and feloniously, utter disloyal, false and contemptuous language, * * * calculated to incite and inflame resistance to the duly constituted state and federal authorities in connection with the war, which language was in substance as follows, to-wit." Then follows a number of alleged seditious utterances, but as the prosecution was required to, and did, elect on which charge it would rely for a conviction, we are not concerned with other than the single charge that she stated: "She wished to goodness the people would revolt and that she would shoulder a gun and get the president the first one."

No demurrer, either general or special, was interposed; but on the opening of the state's case, counsel for the defendant objected to the introduction of any evidence in support of the charge, on the ground, among others, that "the information does not state facts sufficient to constitute a crime or public offense."

1. On the court's action in overruling this objection, [1] defendant predicates error. The objection that the facts stated do not constitute a public offense may be taken either by demurrer or at the trial, under a plea of not guilty, or after the trial, in arrest of judgment. (Sec. 9208, Rev. Codes.)

The sufficiency of the information is to be tested by applying the rules laid down in section 9156, Revised Codes, declaring, in effect, that an information is sufficient if it can be understood therefrom that the act charged as an offense is set forth in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, and is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. (*State v. Bloor*, 20 Mont. 574, 52 Pac. 611.)

"If it be borne in mind that the common law is in force in this state, except so far as it has been supplanted by our Codes, the conclusion cannot be escaped that the provisions of the Penal Code cited, * * * and others germane to the subject, while dispensing with mere matters of form, still re-

quire all the substantial allegations necessary under the common-law rule." (*State v. Beesskove*, 34 Mont. 41, 50, 85 Pac. 376, 377.)

In elucidation of the common-law rule as to "certainty," the author on the subject in Cyc. has this to say:

"*Certainty*.—Being free from doubt; absence of doubt; a clear and distinct setting down of facts so that they can be understood both by the party who is to answer the matters stated against him, the counsel who are to argue them, the jury who are to decide upon their existence, and the court who are (is) the judges (judge) of the law arising out of them. While it has been said that we have no precise idea of the signification of the word, which is as indefinite in itself as any word that can be used, a distinction has long been made between three manner of certainties: (1) To a common intent; (2) to a certain intent in general; (3) to a certain intent in every particular." And in the notes appended, we find: "The first intent is sufficient in bars which are to defend the party and excuse himself; the second is required in indictments, counts, replications, etc., because they are to accuse or charge the party; the third is rejected in law. (Citations.) Certainty to a common intent describes the mode of statement in which words are used in their ordinary meaning, although by argument or inference they may be made to bear a different one. (Abbott's Law Dictionary.) Certainty to a certain intent, in general, is held to mean, what upon a fair and reasonable construction may be called certain, without recurring to possible facts, which do not appear. (Citing cases.)" (6 Cyc. 727.) And, in regard to pleading statutory offenses, the rule is well stated in 22 Cyc., page 335, as follows: "The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requirements that constitute it. Such facts must be alleged that, if proven, defendant cannot be innocent."

Here we have the charge that the defendant said that [2, 3] "She hoped to goodness the people would revolt, and that she would shoulder a gun and get the president the first

one." Does such a charge meet with the requirements above announced? In reading the charge, in order to say that a crime has been committed in making the statement attributed to the defendant, we must infer that she spoke of the people of the United States, and presume that her reference to "the president" was directed at the president of the United States. It may be that the evidence to be introduced, the facts and surrounding circumstances, the whole of the conversation in which the statement was made, would clearly establish the fact that such was the case, and the inference may be reasonable and the presumption so indulged in may be fairly drawn from the alleged statement. But in the pleadings in criminal cases, inferences, however reasonable, cannot be drawn upon to aid the pleader, and no presumption can, for this purpose, be indulged in, as the legal presumption in criminal cases is that the defendant is innocent.

In Oregon, under a statute similar to ours, an information was filed attempting to charge the crime of robbery, but failed to state positively that the defendants were the persons who used force and fear to secure the money taken, and the court said: "It may be inferred, from the statement * * * 'that the said money was then and there unlawfully and feloniously taken from the person of the said William Dompire,' that, since it had been charged in the first clause that the defendants 'did then and there unlawfully and feloniously take from the person of William Dompire' certain moneys, the defendants were the persons charged with using force and fear to secure the money. * * * But the rules of criminal pleading forbid that resort should be had to an inference, however reasonable, to interpret the language of a formal charge, where certainty is demanded by statute. The indictment is not specific in respect to the party charged with using force, which was a particular circumstance of the crime of robbery, and necessary to aver in order to constitute a complete offense." (*State v. Eddy*, 46 Or. 625, 81 Pac. 941, 82 Pac. 707.)

And in *People v. Allison*, 25 Cal. App. 746, 145 Pac. 539, the rule is laid down that "While an indictment will be held suffi-

cient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless, if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime, then it is insufficient in charging the offense. The indictment cannot be aided by presumption, since all presumptions are in favor of innocence, and if the facts stated may or may not constitute a crime the presumption is that no crime is charged." To the same effect, see *People v. Miles*, 9 Cal. App. 312, 101 Pac. 525; *People v. Terrill*, 127 Cal. 99, 59 Pac. 836.

In the case of *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362, this court, after commenting upon our statute requiring certainty, said: "It is not permissible to convict the defendant upon mere inferences; he must be directly, plainly and specifically charged with the commission of a certain crime."

If the language alleged to have been used by defendant could have but one meaning and could refer only to the people of the United States and the president of the United States, then, and only then, would the information charge a certain crime. But the word "people" might refer to the members of any given community or country, and the word "president" to the head of this or any other country having a republican form of government, or to that of any corporation or society. Just prior to the recent general election there was considerable talk, on the one hand, that certain "big interests" had political control of the state, and, on the other, of the threatened control by farmer-labor organizations. Each of such organizations, presumably has a "president," and the statement attributed to the defendant might, by some stretching of the imagination, refer to the one or the other. Certainly, the wish that the people would revolt against such control, and the threat to get the president of any such body, would not be "sedition," whatever else it might be in the state of Montana. The illustration demonstrates the fallacy of contending that the information comes within the rule that the allegations must be such that, if proven, and nothing more appears, "the defendant cannot be innocent," for the want

of material allegations cannot be aided by proof, argument, or inference, nor by the conclusion "contrary to the form of the statute." (22 Cyc. 336.)

The case of *State v. Wyman*, 56 Mont. 600, 186 Pac. 1, is not, as counsel contends, in point, for there there was no question as to what soldiers the defendant referred to, but merely what was the effect of the statement charged as having been made concerning our soldiers, if proven.

The information is fatally defective in that it does not conform to the statutory rule requiring certainty in this regard.

2. A further objection to the information is urged because [4] of the expression used, "which language was in substance as follows." Counsel for the defendant contends that the rule in slander and libel should control in sedition cases, which rule is stated in 25 Cyc. 577, as follows: "An indictment must set out the defamatory matter *verbatim*; to give the substance is not sufficient. Moreover, the indictment must profess on its face to give the very words complained of." While the rule, as stated, is followed in many jurisdictions in slander and libel cases, it is not the universal rule, and absolute accuracy is not always required. A distinction is drawn between an attempt to give the substance of a statement, while not attempting to quote *verbatim*, and the recitation of the pleader's idea of the purport of the statement. (*O'Donnell v. Nee* (C. C.), 86 Fed. 96; *Lee v. Kane*, 6 Gray (Mass.), 495; *Clay v. Brigham*, 8 Gray (Mass.), 162.)

Even in libel cases it is not always necessary to allege the exact language used. Thus in Wharton's Criminal Procedure, volume 1, section 221, it is stated that, where the charge is for a published and written article, if such article has become lost or is in the possession of the defendant, the tenor, effect or substance thereof may be set forth in the pleading.

Without deciding whether the rules laid down for the government of the pleader in libel and slander cases apply in cases such as the one under consideration, we are of the opinion that the allegations of the information in effect charge the exact statement alleged to have been made by the defendant. without, however, vouching for the very words in which it was

couched. The pleader must rely upon the memory of witnesses, and although it may be found that the phraseology used in the charge differs in unimportant particulars from that used by the defendant, if it does appear that the words charged were "in substance" the same as those employed, a conviction would be justified, provided the offense was otherwise properly pleaded. In other words, a defendant manifestly guilty of the utterance of seditious language would not be permitted to escape the just punishment for his crime, merely through a defect in the memory of the witness, as to the use of words meaning, for all practical purposes, the same thing as those incorporated in the information, and therefore the pleader should be permitted to allege that the language used was "in substance as follows," thus guarding against a possible divergence in phraseology, but, in effect, charging the use of the exact language employed.

3. Other specifications of error urged are based on the court's refusal to strike certain testimony which, it is contended, was not properly connected up; but, owing to the disposition made of the case, it will not be necessary to discuss them here.

The judgment and order are reversed and the cause is remanded to the district court for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and COOPER concur.

WILLIAMS, RESPONDENT, v. THOMAS, APPELLANT.

(No. 4,206.)

(Submitted September 24, 1920. Decided December 1, 1920.)

(194 Pac. 500.)

Promissory Notes — Defenses—Release—Duress—Threats—Imprisonment—Want of Consideration—Trial—Practice—Pleadings—Amendment to Conform to Proof—Discretion—Instructions.

Promissory Notes—Defenses—Execution of Release Under Threats—Jury Question.

1. Where, in an action on a promissory note in which the maker interposed the defense that he had been released from liability thereon by an instrument in writing executed by plaintiff, in reply to which the latter alleged want of consideration, in that the release had been secured by intimidation and threats of imprisonment, the question whether the release had been procured under the overpowering influence of threats or fear, and therefore without consideration, was for the jury's determination.

Same—Release—Execution Under Fear of Imprisonment—Effect.

2. Execution of an instrument under fear of imprisonment is sufficient to make it voidable.

Verdict—Evidence—Sufficiency.

3. A verdict based upon evidence which from any point of view could have been accepted as credible by the jury is binding upon the supreme court even though to it it may appear inherently weak.

Trial—Practice—Amendment of Pleadings to Conform to Proof—Discretion.

4. Permission to a party to amend his pleading to conform to the facts proven is a matter within the discretion of the trial court.

Same—Weight of Uncorroborated Testimony—Instructions—Proper Refusal.

5. Refusal of an instruction to the effect that the uncorroborated testimony of a witness is insufficient in law to prove a fact was proper, under section 7861, Revised Codes.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

ACTION by George W. Williams against J. R. Thomas. Judgment for plaintiff. Defendant appeals from it and an order refusing him a new trial. Affirmed.

Cause submitted on briefs of Counsel.

Messrs. Collins, Campbell & Wood, for Appellants.

Mr. J. W. Snellbacher and Mr. E. E. Enterline, for Respondent.

MR. JUSTICE COOPER delivered the opinion of the court.

The complaint is upon a promissory note in the usual form. The answer denies liability and affirmatively alleges that the note sued on was paid as is evidenced by a certain instrument and release in writing on or about November 7, 1914, discharging the obligations of the defendant thereon. The reply denies the averments of the answer, and alleges affirmatively that the release secured by defendant is void for want of consideration, because prior to its execution defendant threatened a criminal prosecution and imprisonment, and that he would institute an action for slander against plaintiff if he did not desist in demand for payment of the note in suit and did not execute a release discharging defendant from liability thereon, for the reason that such demands and insistence of payment of said note tended to ruin defendant's credit in the town of Broadview, where he was then engaged in the mercantile business; that plaintiff, being out of possession of said note and being from time to time intimidated by such threats and believing that such actions could be maintained if he insisted upon payment of said note, had failed to enforce collection thereof, and being ignorant and mistaken in his legal rights in the premises, executed a release prepared by an attorney for the defendant; that before and at the time of the execution of the release the defendant well knew that plaintiff was ignorant of and misapprehended his legal rights in the premises and did not rectify the same, but, on the contrary, induced and caused plaintiff to believe that he, defendant, could prosecute him criminally and sue him for slander, although defendant himself well knew he could not prosecute plaintiff criminally, or otherwise. That until advised by counsel now representing him immediately prior to the bringing of this action, plaintiff was ignorant and mistaken as to his legal rights, was not advised of his right to rescind the release, of his right to collect said note, nor that he could not be subjected to criminal prosecution, or other legal action.

The cause was tried upon the pleadings as they were tendered by the parties; a verdict returned in favor of the plain-

tiff, and judgment rendered thereon. Motion for a new trial was made and overruled, and appeals were taken from the judgment and from the order of the district court denying a new trial.

Motions were interposed by defendant at the end of plaintiff's case and at the close of the evidence challenging the sufficiency of the evidence to support the plea of confession and avoidance and the right of the plaintiff to rescind for the release given. These motions were overruled and the case was submitted to the jury upon the pleadings, the instructions of the court and the evidence. If the result reached by the jury fairly responds to the issues made by the pleadings and finds support in the evidence directed to the only substantial issue of fact in the case, *viz.*, want of consideration for the execution of the release relied upon to defeat the note, the verdict and judgment will be allowed to stand.

Appellant's assignments of error are ten in number. Seven of them (1, 2, 3, 5, 7, 9 and 10) impeach the sufficiency of the evidence to sustain the verdict and findings of the jury. These will be grouped and considered together.

The evidence touching the manner in which the original [1] indebtedness between the parties was created, the evidence as to the correctness with which defendant kept account of the dealings between them, the events leading up to the giving of the note, as well as the execution of the release purporting to discharge the liability of the defendant thereon, the threats of prosecution and of the institution of a civil suit for damages which it is claimed induced the plaintiff to execute the release, and all the incidents attending and illuminating the transactions between the parties in all its essential particulars, was sharply in conflict. The conclusion of the jury upon the evidence was that no consideration passed to the plaintiff for the release so made, and that the acts of the plaintiff in respect thereto were not free or voluntary upon his part. That issue was fairly placed before the jury upon the pleadings and the evidence, unaffected by any error of law upon the part of the court. There was no dispute concerning the execution of the release, so that, if

untainted by fraud, threats, undue influence or advantage taken of the necessities or weakness of the plaintiff as a means to bring about its making, the apparent purpose for which it was made was fully accomplished. Until the integrity of the instrument had been effectively assailed, it imported the effect its terms imply. Upon this showing, the burden then passed to the plaintiff, and obliged him to satisfy the jury by a preponderance of the testimony that the release was given under the overpowering influence of threats or fear, without consideration, and was in fact no release at all. Primarily, the question was whether that requirement had been met by the proof adduced by the plaintiff for that purpose. That issue was found in plaintiff's favor. It was then for the trial court, in passing upon the motion for a new trial, to say whether the evidence upon which the verdict stands was sufficient in substance to sustain it. Upon this controlling question, the evidence, it is true, was in sharp conflict; but, by the jury, it was held to be of preponderating influence against the validity of the release, and by the trial court sufficient in weight to uphold the judgment. By that we are bound. (*Harrington v. Butte & B. Min. Co.*, 27 Mont. 1, 69 Pac. 102.)

Upon the pleadings, made up as they were, and the theory [2] of the case adopted as it was by the plaintiff and followed by the defendant, there was no room for any issue other than the consideration for the instrument by which defendant sought to be exonerated from liability upon the note in suit. If the note had been paid in fact, or the liability of the defendant thereon discharged in some other manner, and the plaintiff acted in its making as a free agent, uninfluenced by such threats, impositions, fear or menace as would unseat the will, then the verdict and judgment should have been the other way. But if the defendant made threats to imprison the plaintiff if he did not execute the release, and they were sufficient in severity and apprehension to overcome his mind and to subject his will to that of the defendant, that of itself would be sufficient to overthrow the instrument and to entitle the plaintiff to a verdict at the hands of the jury. (Rev. Codes, sec. 4976; 1 Story's Equity Jurisprudence, 14th ed.,

sec. 342; Bishop on Contracts, secs. 716, 717.) As was said by Lord Ellenborough in a case involving a similar principle: "This is not a case *par delictum*; it is oppression on one side and submission on the other; it never can be predicated as *par delictum*, when one holds the rod and the other bows to it." (*Smith v. Cuff*, 6 Maule & S. 160, 105 Eng. Reprint, 1203; see, also, Pomeroy's Equity Jurisprudence, sec. 942, and cases there cited.)

The ultimate fact for determination here is whether the release was due to the free and voluntary operations of a mind unfettered by fear or apprehension, or of a mind subservient to dictation or to an unlawful intimidation or compulsion of another. It has been said that a man cannot avoid his contract on the ground that it was procured through the fear of imprisonment. But Lord Coke says the fear of imprisonment is enough. (2d Inst. 483; Coke Litt. 253, b.) And so the rule has been understood since that time. (Com. Dig., Pleader, 2 W. 20; Bac. Ab., Duress A.; 1 Chitty on Contracts, 273.) As civilization has advanced, the law has tended more strongly to overthrow everything which is built upon violence or fraud. Such a contract wants the voluntary assent of the party to be bound by it. (*Foshay v. Ferguson*, 5 Hill (N. Y.), 154.)

Cases of this class must stand upon their own particular circumstances. They are so numerous, and the devices resorted to so varied, that it would be impossible to lay down a rule of law applicable to every state of facts involving ignorance or mistake, mixed with misrepresentation, fraud, menace or imposition preventing the free operations of the will, and where through the frailty of one a benefit has been conferred upon another which he cannot in good conscience retain. In the present case, it does appear that the jury believed that the plaintiff was induced to execute the release and to discharge the obligation of defendant under compulsion, contrary to his will and inclination, and under a threat of imprisonment sufficient to compel him to submit to an illegal exaction by the force of a dominant will he was not able to withstand.

The case made by the plaintiff—he was the main witness

[3] who testified in his favor as to the transaction out of which the controversy arose—is inherently weak, so much so that we can hardly reconcile ourselves to the idea that any body of reasonable men, such as we must presume the jurors who returned the verdict in this case were, could give plaintiff's own testimony credit after considering it in the light of all the attendant circumstances. So long as we have a jury system, however, and it is the office of the jurors to judge of the effect or value of evidence addressed to them and to determine the credibility of witnesses, this court is bound by their finding, if based upon evidence which from any point of view they could have accepted as credible. We, therefore, reluctantly concur in the results reached by the jury and the trial court.

The fourth specification charges error in allowing the [4] plaintiff to amend his reply in accordance with the facts proven. This was a matter entirely within the discretion of the trial court. In view of the fact that the pleadings and the issues were adjusted and determined by the parties themselves, and the trial conducted in conformity with the theory thus adopted and pursued by both parties, the ruling of the court in this regard ought not to be disturbed.

In specification No. 5 appellant complains of the refusal [5] of the court to charge the jury that the uncorroborated oral testimony of the plaintiff is insufficient in law to entitle him to rescind the release in question. Inasmuch as section 7861, Revised Codes, provides otherwise, no error can be predicated on the refusal of the court to so charge the jury.

The judgment and order are affirmed.

'Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and MATTHEWS concur.

ON MOTION FOR REHEARING.

(Decided January 17, 1921.)

MR. JUSTICE COOPER delivered the opinion of the court.

Counsel for appellant insists that the decision of this court "ignores the theory upon which the said action was tried in the district court and is predicated and based upon a theory never before suggested, either in the trial of the action of the court below or upon the submission of the action upon appeal, and that the adoption in this court of the theory of the case in the court below, as outlined in the record and as defined by the instructions in the district court, would render impossible the decision rendered by this court."

In the opinion, the issues tendered by the answer and the replication are fully and fairly recited and need not be repeated. That the case was tried upon the very theory counsel now says was "never before suggested," is clearly evinced by the pleadings themselves, the evidence, the instructions and the interrogatories the trial court submitted to the jury, at the request of counsel for appellant. In the first of the special questions propounded upon plaintiff's theory of the case, the jury found that the release introduced in evidence was not executed by the plaintiff freely and voluntarily; and in response to the other—embodying the defendant's theory of the case—that the check introduced in evidence by the defendant was not given to the plaintiff in payment of the note sued upon or any part thereof.

The court's instruction No. 12, tendered by defendant's counsel and given to the jury, is a full and complete exposition of the law upon the question counsel now asserts was never suggested in the court below. It is as follows:

"You are instructed that in this case you must first consider and determine the sufficiency of the proof offered by the plaintiff tending to establish his right to rescind the release that has been introduced in evidence in this case. That

the burden of proof is upon the plaintiff to establish to your satisfaction by a reasonable and clear preponderance of all of the evidence in this case that he did not execute and deliver such release freely and voluntarily, but, on the contrary, you must find that the plaintiff has established to your satisfaction by a clear preponderance of all of the evidence in this case that:

“(a) The defendant, Thomas, did threaten the plaintiff, Williams, with criminal prosecution, imprisonment or an action for slander for the purpose of inducing the plaintiff, Williams, to execute said release.

“(b) That the plaintiff Williams, was advised by his said attorney that the plaintiff could so prosecute, imprison or sue him.

“(c) That, relying upon the advice of his attorney, and being actually mistaken as to his legal rights and liabilities, he was misled by such mistake to execute and deliver said release.

“(d) That the defendant, Thomas, at the time of the execution of said release and prior and subsequent thereto, well knew that the plaintiff was ignorant of and misapprehended his legal rights, and that he, Thomas, did not rectify the same, but, on the contrary, induced and caused the plaintiff to believe that he, Thomas, could prosecute the plaintiff criminally or sue him for slander, and that thereby he induced and caused the plaintiff to execute said release.

“(e) That Thomas, the defendant, knew that he could not prosecute the plaintiff criminally or sue him for slander under the circumstances aforesaid.”

Instruction No. 14 was likewise proposed by defendant and given by the court, and advised the jury in plain terms “that a party to a contract could rescind the same if the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud or undue influence, exercised by or with the

connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

The motion for rehearing is denied.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ASSOCIATE JUSTICES HURLY and MATTHEWS, who participated in the original opinion, are no longer members of the court and therefore take no part in the opinion on motion for rehearing.

STATE, RESPONDENT, v. COLBERT, APPELLANT.

(No. 4,589.)

(Submitted November 15, 1920. Decided December 6, 1920.)

[194 Pac. 145.]

Criminal Law — Homicide — Defenses — Insanity—Evidence—Admissibility — Presumptions — Burden of Proof — Instructions.

Homicide—Defense—Insane Impulse—Evidence—Admissibility.

1. In a prosecution for murder in which the defense was irresistible insane impulse induced by unspeakable crimes committed on defendant by deceased, testimony touching the former's association with the latter, the defendant's conduct and habits as well as statements and declarations made by him before and after the homicide, reflecting in any way upon his mental condition, was admissible, the guide for determining its admissibility being remoteness in time from the homicide.

Same—Rebuttal Testimony—Admissibility.

2. It was competent for the state to controvert the testimony of defendant's witnesses above referred to, by evidence tending to show that he was on friendly terms with him and that there was nothing unusual in his conduct or physical condition during the time testified to.

Same—Rebuttal Testimony to Discredit Defendant—Admissibility.

3. Evidence otherwise competent may not be excluded on the ground that it had an incidental tendency to disclose something to defendant's discredit, i. e., that he was in the habit of frequenting saloons.

Same—Presumptions.

4. The homicide being established, nothing else appearing, the presumption of innocence is overcome, and the presumption that defendant intended the ordinary consequences of his voluntary act comes to the aid of the prosecution and establishes the necessary element of malice.

Same—Murder in Second Degree—Proof Required.

5. To warrant a finding of murder in the first degree, the state must establish premeditation and deliberation, while to find defendant guilty of murder in the second degree, proof of the killing alone is sufficient.

Same—Insanity—Burden of Proof—Instructions.

6. In a prosecution for murder, an instruction that, the commission of the homicide being proved, the burden rested upon defendant to offer evidence in support of his defense, the burden, however, being no greater than to introduce evidence sufficient to raise a reasonable doubt as to his guilt, was proper.

Same—Proof in Mitigation—Burden on Defendant, When.

7. The homicide having been established and the evidence introduced by the state containing nothing tending to mitigate, justify or excuse it, it was incumbent upon defendant to introduce such evidence, failing to do which a verdict of guilty was the logical result.

Same—Defense—Insanity—Proper Instruction.

8. An instruction that if the jury believed beyond a reasonable doubt that defendant committed the crime as charged, knowing it was wrong and mentally capable of choosing either to do or not to do the act and of governing his conduct in accordance with his choice, they should find him guilty, though believing he was not entirely and perfectly sane, properly stated the law.

Same—Instructions to be Considered as a Whole.

9. The charge to the jury must be considered as a whole, and if a particular instruction is correct in point of law and applicable to the evidence, it is not erroneous because it does not refer to instructions on other branches of the case with which it is consistent.

Same—Insanity—Refusal to Give Separate Instruction—When not Reversible Error.

10. Where, from the charge as a whole, the jury must have understood that after defendant had introduced evidence tending to show that he was insane when he committed the homicide for which he was on trial the burden then shifted to the state to establish his sanity, failure to give a separate instruction to that effect was not reversible error.

(MR. JUSTICE HOLLOWAY dissenting.)

'Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

JAMES COLBERT was convicted of murder in the second degree, and from the judgment and an order denying his motion for new trial he appeals. Affirmed.

Messrs. Canning & Geagan, for Appellant, submitted a brief; Mr. M. F. Canning argued the cause orally.

Mr. S. C. Ford, Attorney General, Mr. Frank Woody, Assistant Attorney General, Mr. N. A. Roterling, and Mr. Frank L. Riley, for Respondent, submitted a brief; Mr. Roterling argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted of murder in the second degree. From the judgment and an order denying his motion for a new trial he has appealed.

The evidence introduced by the state showed that on the evening of December 5, 1918, the defendant and his brother were standing on the north side of East Park Street near its intersection with Thornton Avenue, in the city of Butte, when Patrick Foley, the deceased, came walking toward them. When he had approached to within twenty or twenty-five feet, the defendant, without apparent cause or reason, drew an automatic pistol from his pocket and shot him. The deceased fell to the ground, dying a few minutes later. While he was lying on the ground, the defendant approached him, with the pistol presented, and stood pointing it at his head until apparently satisfied that he was dead. He thereupon turned to his brother, handed him the pistol, and turning away went directly to the sheriff's office and, after stating that he had killed the deceased, surrendered himself to this officer. As a defense, evidence was adduced to show that the homicide was due to an irresistible insane impulse induced by previous acts of the deceased toward the defendant which had continued over a period of several months prior to the homicide. These acts, defendant's evidence tended to show, were repetitions of the crime against nature committed upon the person of the defendant by the deceased.

The propriety of the conviction is assailed on the grounds that the court erred to the prejudice of the defendant in refusing to exclude testimony of the four witnesses Curtis, Rule, Couch and Green, called in rebuttal by the state, and in submitting instructions to the jury.

There was evidence, which was not controverted, that during the afternoon of December 5, and some hours before the homicide, defendant purchased the pistol from a dealer; that thereupon, in company with his brother, he went in search of the deceased; that the deceased was a single man, a miner

by occupation; that he occupied a room at a rooming-house kept by Mrs. Nelson and obtained his meals at the Clarence Hotel, kept by Mrs. Irvine, both places being on Park Street, a short distance east from the scene of the homicide; that the defendant and his brother, having sought the deceased at both these places but having failed to find him, were standing together at or near the intersection of the streets mentioned above, and were apparently waiting to meet the deceased while on his way from work to his room or boarding place; that in a few minutes the brother called the attention of defendant to the approach of the deceased and that the defendant thereupon drew his pistol and shot the deceased. Immediately before or after he fired the shot, he used the following expression, or one of similar import: "You will make no more trouble for me now."

The testimony of many witnesses, both laymen and experts, [1] was introduced by the defendant, tending to show that the shot was the result of an irresistible impulse of momentary insanity induced by the sudden appearance of the deceased, coupled with the recollection by defendant of the unspeakable crimes which the deceased had perpetrated upon him. Some of the witnesses, including defendant's mother and sister, testified in detail as to the history of defendant's life and particularly as to his appearance and behavior during several weeks immediately prior to the day of the homicide, and also as to his apparent physical condition. These witnesses testified that his physical health was not good. Their testimony tended to show that he had grown sullen and moody, remained at home, neglected to go to his daily work in the mine where he was employed, abstained from food, and was afflicted at times with fits of weeping, for which he refused to give any explanation. The defendant himself testified as to the crimes perpetrated upon him, asserting that he was afraid of the deceased and that he avoided him as much as possible. In addition to expert medical testimony, the state introduced and examined several lay witnesses, whose testimony tended to show that defendant worked as usual up to two days before the homicide and that nothing unusual was observed by them

in his conduct or physical condition. Among these was the witness Curtis, who was a shift boss in the Leonard mine at Butte. He testified that the defendant worked steadily in this mine from August 30 to September 26, doing contract work, which was more difficult than that which he did when working by the day. The witness Rule had known the defendant for three or four years. He testified that he himself was a saloon-keeper; that the defendant and the deceased were frequently together at his place, were apparently friendly, and that he had never observed anything wrong with the defendant. The witness Couch testified that he had known the defendant for thirteen or fourteen years, from the time he was a small boy, and that he was always a good boy, so far as he knew. The witness Green testified that he had known both the defendant and the deceased during the year 1917 at Burke, Idaho, where they worked for the same employer as miners and lived together in a cabin. He had also known both in Butte during the year 1918 prior to the homicide, and stated that they were frequently together. The testimony of all these witnesses was admitted over the objection that it was immaterial and irrelevant. It is argued that this evidence was improperly admitted, in that it did not reflect in any way upon the mental condition of the defendant, and that it was prejudicial because it showed incidentally that defendant was in the habit of frequenting saloons. The several rulings were correct.

The testimony introduced by the defendant was competent. A wide discretion is vested in the trial court in ruling upon the admissibility of evidence in such cases. Every fact, including the conduct and habits of the accused and statements and declarations made by him, both before and after the homicide, which reflects in any way upon his mental condition, may be admitted for consideration by the jury, whether the particular fact or incident has any probative value because of its remoteness in time from the homicide being the guide by which its admissibility is to be determined. (1 Wharton & Stille's Medical Jurisprudence, sec. 326; 7 Ency. of Evidence, 449 *et seq.*; *Commonwealth v. Pomeroy*, 117 Mass. 143; *Barnett v.*

State (Ala.), 39 South. 778; *State v. Leakey*, 44 Mont. 364, 120 Pac. 234; *People v. Wood*, 126 N. Y. 249, 27 N. E. 362; *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177.) For the [2] same reason it was competent for the state to controvert the testimony of defendant's witnesses by evidence tending to show that the defendant was not, in fact, afraid of the deceased, but was on friendly terms with him, and that there was nothing unusual in his conduct or physical condition during the time with reference to which his witnesses testified. That the testimony of the witnesses in question incidentally disclosed that the defendant was in the habit of frequenting saloons did not affect its competency. The court should in every case carefully guard against the admission of evidence which tends to present collateral matters and thus prevent the [3] real issue from becoming obscured. At the same time, evidence otherwise competent may not be excluded on the ground that it has an incidental tendency to disclose something to the defendant's discredit. (*State v. Shafer*, 26 Mont. 11, 66 Pac. 463.) But, if it be conceded, for the sake of argument, that the evidence should have been excluded because it tended to discredit defendant, it could not have wrought prejudice, for it appeared from the testimony of several of defendant's witnesses that he was in the habit of drinking and of visiting saloons for that purpose, and that upon one occasion he and his brother engaged in a fight with the deceased.

It is contended that the court erred in submitting to the [4-7] jury the following instructions:

"No. 9. Every person in law is presumed to intend the ordinary consequences of his voluntary act."

"No. 19. You are instructed that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden then rests upon the defendant of offering evidence in support of his defense or defenses, but in any case no greater burden rests upon the defendant than to introduce evidence sufficient to raise a reasonable doubt as to his guilt."

"No. 22. You are instructed that, if from all the evidence in the case you believe, beyond a reasonable doubt, that the

defendant committed the crime of which he is accused, in manner and form as charged in the information, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do the act or acts constituting such crime and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe from the evidence that at the time of the commission of the crime he was not entirely and perfectly sane."

"No. 25. If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, James Colbert, on or about the fifth day of November, 1918, at the county of Silver Bow, state of Montana, did unlawfully, willfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, kill and murder Patrick Foley in the manner and form as charged in the information, by shooting the said Patrick Foley with a pistol or revolver, then the defendant is guilty of murder in the first degree and you will so find by your verdict."

It is insisted that instruction No. 9 was in direct conflict with instructions Nos. 3 and 7. In instruction No. 3 the jury were told that in a criminal action the defendant is presumed to be innocent until the contrary is proved, and that in case there is a reasonable doubt of his guilt, he is entitled to acquittal. Instruction No. 7 informed them that the intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. Conceding that these instructions were correct, counsel say that since the intent is the gist of the crime of murder, it cannot be established by a legal presumption, which instruction No. 9 told the jury is the law. There is no merit in the contention. It proceeds upon a misconception of the office served by the presumption of innocence in murder cases. It assumes that at no time during the course of the trial does this presumption cease to aid the defendant, and therefore that no other presumption is to be indulged. The presumption is a rebuttable one (Rev. Codes, sec. 7962), and may be

overcome by evidence. When this is done, it ceases to operate and its office is ended. (*State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.)

In murder cases when the killing is proved, the burden shifts to the defendant to adduce evidence tending to show mitigation, excuse, or justification. This is made the rule by the statute. (Rev. Codes, sec. 9282.) When, therefore, the homicide is established, nothing else appearing, the presumption of innocence is overcome and the presumption declared in instruction No. 9 comes to the aid of the prosecution and establishes the malicious intent which is a necessary element of the crime, and warrants a verdict finding the defendant guilty of murder. To warrant a finding of murder in the first degree, the prosecution must, of course, establish premeditation and deliberation. (*State v. Kuum*, 55 Mont. 436, 178 Pac. 288.) But to establish murder as defined in our Codes (sec. 8290), proof of the killing alone is sufficient to make out the case.

Of sections 186 and 1105 of the Penal Code of California, which are identical with sections 8290 and 9282 of our Codes, the supreme court of that state, in *People v. Jones*, 160 Cal. 358, 117 Pac. 176, said: "The effect of section 187 and of section 1105 of the Penal Code, construed together, is as though the law expressly declared that, while murder is the unlawful killing of a human being with malice aforethought, every killing is murder unless the defendant proves the contrary." We agree that this is the logical effect of the sections of our Codes *supra*, with the reservation, however, that in California mitigating circumstances, or those justifying or excusing the killing, must be shown by preponderance of the evidence (*People v. Ah Duck*, 61 Cal. 388), whereas in this state no greater burden is cast upon the defendant than to introduce evidence sufficient to raise a reasonable doubt. (*State v. Kuum, supra*; *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. Leahey*, 44 Mont. 354, 120 Pac. 234.) The rule in other cases in which a specific intent is a necessary element of the crime is that the prosecution is required to prove it, or, what

is equivalent, circumstances from which the jury may properly infer such intent. In such cases the propriety of giving the instruction is at least questionable. (*State v. Schaefer*, 35 Mont. 217, 88 Pac. 792.) But in murder cases section 9282, *supra*, dispenses with the necessity of evidence showing such intent, leaving it to be supplied by the presumption arising from the proof of the act of killing. Whatever, therefore, may be said of the propriety of the giving of the instruction in cases of manslaughter—because in such cases the accused is not presumed to be actuated with an intent to kill, though such intent may in fact exist—as this is a murder case, the giving of the instruction was entirely proper.

It is argued that in the omission of the last clause of section 9282, beginning with the word “unless” from the instruction No. 19, the court in effect told the jury that by the state’s evidence the burden was cast upon the defendant of proving his innocence, whereas it was possible that from the state’s evidence the jury might have believed that the act of the defendant in killing Foley was not that of a sane person. In other words, the instruction made it imperative that the defendant should introduce evidence in mitigation, or to excuse or justify the killing, and that if he failed to do so the jury could draw the conclusion that he was guilty. This is just what the statute declares. The defendant is not bound to introduce any evidence. He may rest upon the case made by the prosecution. In the sense, however, that when the homicide is established and the evidence introduced by the prosecution contains nothing tending to mitigate, justify or excuse it, as was the case here, it is imperative that the defendant introduce such evidence, if he desires to make any defense. If he does not, a verdict of guilty is the logical result. (*State v. Leakey, supra.*) The inquiry whether in a case where the evidence of the prosecution does disclose circumstances which tend to mitigate, excuse or justify the killing, the omission by the trial court of the clause in question would be held prejudicial, it is not necessary to consider because it does not arise here. In no case, however, may the trial court be held

in error when it has given an instruction fully applicable to the facts disclosed by the evidence.

There was no error in giving instruction No. 22. It was first [8] considered and expressly approved by this court in *State v. Peel, supra*. The doctrine laid down in this case was later considered and approved in the case of *State v. Keerl*, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362, and in that of *State v. McGowan*, 36 Mont. 422, 93 Pac. 552. Further consideration of it would be a profitless task.

It is argued that in submitting instruction No. 25 the court [9, 10] should have told the jury that it was incumbent upon the prosecution to prove the sanity of the defendant beyond a reasonable doubt. A trial court cannot embody all the law applicable to the case in a single paragraph of the instructions. The charge must be considered as a whole. (*State v. Van*, 44 Mont. 374, 120 Pac. 479; *State v. Byrd*, 41 Mont. 585, 111 Pac. 407), and if a particular instruction is correct in point of law and applicable to the evidence, it is not erroneous because it does not refer to instructions on other branches of the case with which it is entirely consistent. When the charge in this case is read as a whole, it cannot be doubted that the jury understood that after the defendant had introduced evidence tending to show that he was insane when he committed the homicide, the burden then shifted to the prosecution to establish his sanity beyond a reasonable doubt.

The judgment and order are affirmed.

'Affirmed.

ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

MR. JUSTICE HOLLOWAY dissents.

WOODWARD ET AL., APPELLANTS, v. MELTON ET AL.,
RESPONDENTS.

(No. 4,227.)

(Submitted November 18, 1920. Decided December 6, 1920.)

[194 Pac. 154.]

Tort—Change of Venue—Joinder of Causes of Action—Effect on Right to Change—Pleadings—Liberal Construction—Inferences.

Tort—Change of Venue—Joinder of Causes of Action—Effect on Right to Change.

1. Where the complaint in an action in tort set forth two causes of action, one of which was properly triable in the county in which it was commenced, defendants' right to a change of venue as to the other was not abridged by plaintiffs' joining the two.

Same—When Venue cannot be Changed.

2. If an action in tort was properly brought in the county in which it was committed, the venue cannot be changed, over plaintiff's objection, upon the ground of defendant's residence in an adjoining county where he was served with summons.

Pleadings—Liberal Construction—Inferences.

3. It is the policy of the Practice Act that the most liberal rules of construction shall be applied to pleadings in civil actions; hence whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred.

Same—Complaint—Sufficiency—Inferences.

4. *Held*, under the above rule (paragraph 3), that the complaint alleging that plaintiffs were engaged in business in M. county, breeding, raising, etc., sheep, "and for that purpose and to that end" had leased certain lands, describing them by government subdivisions, all in a certain township and range, and that defendants wrongfully grazed their sheep affected with contagious and infectious disease, on and over "the said lands of plaintiffs," etc., was sufficient to show that the lands were in M. county and that the wrong was committed therein.

Appeal from District Court, Beaverhead County; William A. Clark, Judge.

ACTION by John Woodward and others against George M. Melton and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Mr. M. M. Duncan, for Appellants, submitted a brief and argued the cause orally.

Messrs. Rodgers & Gilbert and Mr. Geo. M. Melton, for Respondents, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This appeal from a final judgment in favor of defendants presents for determination the question of the correctness of the trial court's ruling in granting a change of venue from Madison county, where the action was commenced, to Beaverhead county, where defendants reside, and where they were served with summons.

The complaint sets forth two causes of action, each for [1] damages occasioned by the alleged tortious acts of the defendants. The first cause of action is not involved upon this appeal, as it is conceded that the wrong there complained of was committed in Madison county. If, however, defendants were entitled to a change of venue as to the second cause of action, their right thereto could not be abridged by plaintiffs joining the two causes of action. (*Yore v. Murphy*, 10 Mont. 304, 25 Pac. 1039; *Bond v. Hurd*, 31 Mont. 314, 3 Ann. Cas. 566, 78 Pac. 579; *State ex rel. Stephens v. District Court*, 43 Mont. 571, Ann. Cas. 1912C, 343, 118 Pac. 268.)

If the tort of which complaint is made in the second cause [2] of action was also committed in Madison county, then the action was properly brought in that county, and the venue could not be changed (over plaintiffs' objection) upon the ground that the defendants reside in Beaverhead county and were served with summons there. (*State ex rel. Interstate Lumber Co. v. District Court*, 54 Mont. 602, 172 Pac. 1030; *Denver etc. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285.)

In the second cause of action it is alleged that ever since [3, 4] a long time prior to December 1, 1915, plaintiffs have been engaged in the sheep business in Madison county, Montana, breeding, raising, growing, buying and selling sheep, "and for that purpose and to that end" they had under lease from the Northern Pacific Railway Company, 1,680 acres of land—particularly describing it by government subdivisions—all in township 5 south, range 5 west. It is then alleged that during the fall of 1915 and the winter following, defendants wrongfully herded and grazed their sheep, which were affected

with a dangerous, contagious and infectious disease, on and over "the said lands of plaintiffs," and "then and there" wrongfully and maliciously mixed said diseased sheep with plaintiffs sheep, by reason whereof plaintiffs' sheep became infected, etc.

Does it appear from these allegations that the wrong was committed in Madison county? We are asked to take judicial notice of the fact that there is but one principal meridian in Montana from which government surveys are made, and that all of township 5 south, range 5 west, is in Madison county. We might comply with this request, if it were necessary to do so (*State ex rel. Arthurs v. Board*, 44 Mont. 51, 118 Pac. 804), but in our opinion the necessity does not arise in this instance.

It is the policy of our Practice Act that the most liberal rules of construction should be applied to pleadings in civil actions. Indeed, the rule is now established in this jurisdiction that "Whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as directly averred." (*Buhler v. Loftus*, 53 Mont. 546, 165 Pac. 601; *Kummrow v. Bank*, 57 Mont. 390, 188 Pac. 649.)

Respondents contend that it cannot be determined from the description—township 5 south, range 5 west—in what county, or even in what state, the lands are situated, and that might be true if the description stood alone, but it does not. From the allegation above that plaintiffs leased the lands in township 5 south, range 5 west, for the purpose of conducting their business in Madison county, the only fair inference deducible is that the lands described are in Madison county. In other words, we think it is not a strained construction of the language to say that plaintiffs allege, in effect, that they leased the lands in township 5 south, range 5 west, in Madison county, for the purpose of conducting their business.

It may be conceded that the pleading is not a model of perspicuity, but, construed liberally, we think it is apparent therefrom where the tort was committed. It follows that the court erred to the prejudice of plaintiffs in transferring the cause for trial to Beaverhead county. (*State ex rel. Inter-*

state Lumber Co. v. District Court, above; *Powers v. Reynolds*, 89 Ky. 259, 12 S. W. 298, 553.)

The judgment is reversed and the cause is remanded to the district court, with directions to retransfer the cause to Madison county for trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

BABCOCK ET AL., APPELLANTS, v. ENGEL, RESPONDENT.

(No. 4,220.)

(Submitted November 17, 1920. Decided December 6, 1920.)

[194 Pac. 137.]

Specific Performance—Defenses—Intoxication—Inadequacy of Consideration — Appeal and Error — Findings—Evidence—Insufficiency—Scope of Review—Theory of Case.

Specific Performance—Discretion.

1. Specific performance is not granted as a matter of right, but in every instance the application is addressed to the sound discretion of the court.

Appeal and Error—Equity—Findings—Evidence—Insufficiency.

2. On appeal in an equity case, where the ground on which reversal is asked is that the evidence does not sustain the findings, the question is not whether every finding is sustained, but whether there is any correct finding which will support the judgment.

Specific Performance—Defense—Intoxication—Contract Voidable, When.

3. If defendant in a suit for specific performance of a contract to sell and convey realty was so far under the influence of intoxicating liquor at the time he signed the contract that he was incapable of giving his assent, it was voidable at his election when he became sober.

Same—Intoxication—Evidence—Sufficiency.

4. Evidence held to show some substantial support for the finding that when defendant entered into a contract of sale of realty, specific performance of which was sought by the buyer, defendant was intoxicated.

Same—Findings—Evidence—Insufficiency—Scope of Review.

5. On appeal, in an equity case, from the judgment only, the supreme court will go no further, in disposing of the assignment that the evidence is insufficient to support the findings, than to ascertain whether there is substantial evidence to support them.

Same—Inadequacy of Consideration—Statutory Defense.

6. By express declaration of section 6103, Revised Codes, inadequacy of consideration is made a defense to an action for specific performance of a contract.

Same—Defense of Intoxication—Question of Fact.

7. The question whether a party to a contract was so far under the influence of intoxicating liquor as to render him incapable of giving his consent is one of fact, to be determined from all the evidence.

Same—Defenses—Intoxication—Inadequacy of Consideration—Burden of Proof.

8. Where in a suit for specific performance the defense of inadequacy of consideration is coupled with that of intoxication, the rule that where defendant relies on the defense of intoxication alone, he must show that he was so far under the influence of intoxicants as to render him incapable of consent at the time the contract was executed, is less stringent, on the theory that equity will not compel the performance of an unjust contract procured from one under the influence of intoxicants whereby he was more easily influenced into a bad bargain than when sober.

Trial—Theory of Case—Appeal.

9. The issue of inadequacy of consideration, though improperly joined with the defense of latent defects in the property which was the subject of a suit for specific performance, having been tried as though properly before the court, appellant was estopped to urge on appeal that the issue was not properly raised by the pleadings.

Appeal from District Court, Musselshell County; Charles L. Crum, Judge.

ACTION by G. M. Babcock and Ida Babcock against Charles A. Engel. From a judgment dismissing the complaint, plaintiffs appeal. Affirmed.

Messrs. Carothers & Jones, Mr. J. W. Barker, Mr. Rudolf Von Tobel, Mr. Henry C. Smith and Mr. Park Smith, for Appellants, submitted a brief; Mr. Henry C. Smith argued the cause orally.

We contend that the defendant failed to prove that he was even drunk; but assuming that he was intoxicated to some extent, his condition was not such as to authorize him to rescind his solemn, acknowledged contract.

On right to affirmative relief in equity from contract upon the ground that it was procured from complainant while intoxicated, see note in 17 L. R. A. (n. s.) 1066.

Degree of intoxication of contracting party necessary to invalidate contract, see note in 8 Ann. Cas. 254.

Intoxication must be so deep and excessive as to deprive one of his understanding. If intoxication is relied on as a defense, it must be to such a degree that the party who wishes to avoid his contract on this ground must have been deprived of his reason and understanding. (14 Cyc. 1103; 6 Ruling Case Law, "Contracts," 595-631.) Drunkenness must be so complete as to suspend all rational thought. (*Seeley v. Goodwin*, 39 Nev. 315, 156 Pac. 934.) Incapacity from use of intoxicating liquors must be proved by clear and satisfactory evidence leaving no substantial doubt. (*Burnham v. Burnham*, 119 Wis. 509, 100 Am. St. Rep. 895, 97 N. W. 176.) In the case of *Pickett v. Sutter*, 5 Cal. 412, the court said: "It is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such an extent as to seriously impair the reasoning faculties at the time of the contract." "Drunkenness, to afford ground for avoiding a contract, must be so excessive as to render the person incapable of consent, or for the time to incapacitate him from exercising his judgment." (*Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.) "Where a purchaser or seller of any property, real or personal, buys or sells upon a mistaken idea of its nature, quality or value, this mistake of one, unless induced by the other, does not affect the binding force of the agreement." (9 Cyc. 395.) Mere expression of opinion as to value does not amount to fraud or warranty. (9 Cyc. 416; *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40.) "One who contracts for the purchase of real estate in reliance on the misrepresentations and statements of the vendor as to its character or value, but after he has visited and examined it for himself, and has had the means and opportunity of verifying such statements, cannot avoid the contract on the ground that they were false or exaggerated." (*Brown v. Smith*, 109 Fed. 26; *Slaughter's Admr. v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627; *Farrar v. Churchill*, 135 U. S. 609, 34 L. Ed. 246, 10 Sup. Ct. Rep. 771; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. Ed. 678, 8 Sup. Ct. Rep. 881; *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271 [see, also, Rose's U. S. Notes].)

Where the wife did not join in the contract, specific performance may be decreed against the husband, reserving the wife's dower right. (*Jones v. Geiske*, 25 Mont. 132, 63 Pac. 1042.)

A cause of action for specific performance of a contract may be joined with one for damages for a breach. (Pomeroy's Code Remedies, 4th ed., sec. 348; *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440; *Tootle v. Kent*, 12 Okl. 674, 73 Pac. 310; *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206; *Krakow v. Wille*, 125 Wis. 284, 4 Ann. Cas. 1016, 103 N. W. 1121.)

Mr. W. C. Husband and *Mr. V. D. Dusenbury*, for Respondent.

That the degree of intoxication shown by the evidence and established by the finding in this case is sufficient to invalidate the contract is well established by the authorities. In 6 R. C. L., at page 597, the rule is stated as follows: "The rule generally recognized at the present time is, that the intoxication of a party which will invalidate a contract entered into by him must be such as to render him incapable of knowing what he is doing, or to deprive him of the powers of reasoning and understanding to such an extent that he fails entirely to comprehend the consequence of his acts." However, it should be borne in mind that the rule stated above relates to the validity of a contract in a court of law. It is also clearly established by the authorities that in an action for specific performance, the intoxication of the defendant to such a degree that he is incapable of giving an intelligent assent, although it might not be sufficient ground for the rescission of a contract, is nevertheless a defense for its specific enforcement. In 36 Cyc. 614, the rule is stated as follows: "It is the rule laid down by many cases that defendant's intoxication, to such a degree that he is incapable of giving an intelligent assent, even though it is not unfairly taken advantage of by the other party, and may not be ground for rescission of the contract, is nevertheless a defense to its specific enforcement. It is certainly a matter to be given great weight in connection with other inequitable incidents."

In 25 R. C. L., page 241, we find the following: "Ignorance, inexperience, or even habitual intemperance of one of the contracting parties may be a ground for denying a decree for specific performance, where it is sufficient to cast a suspicion on the fairness of the transaction."

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts out of which this controversy arose are substantially these: On November 22, 1916, Chas. A. Engel entered into an agreement in writing with G. M. Babcock and wife, by the terms of which Engel agreed to sell and convey to Babcock 320 acres of agricultural land situated near Ryegate, Montana, subject to a mortgage of \$1,500, which Babcock assumed and agreed to pay, and also agreed to sell to Babcock personal property of the designated value of \$2,000. In consideration therefor Babcock and wife agreed to sell and convey to Engel the New Park Hotel property in Ryegate, consisting of two town lots, with the hotel building and other improvements, and including, also, the furnishings in and belonging to the hotel, subject to a mortgage of \$3,500, which Engel assumed and agreed to pay. The contract provided that the conveyances should be executed and delivered within five days; but, before the expiration of that period, Engel gave notice that he would not be bound, and this suit to enforce specific performance was instituted. The wife of Engel was made a defendant, but there was not any attempt to fasten liability upon her, as she was not a party to the contract.

Engel interposed the following defenses: (1) That the contract was not to become effective unless and until approved by Mrs. Engel, and that her approval was never secured and could not be secured; (2) that the hotel property was subject to an outstanding lease, which precluded plaintiffs from giving possession; (3) that the hotel bore a bad reputation, which fact was fraudulently concealed; (4) that there were latent defects in the building, which greatly impaired its value, which fact was also fraudulently concealed by Babcock, and that the value of the property to be transferred by plaintiffs was

so much less than the value of the property to be conveyed by Engel that the bargain, if enforced, would be an unconscionable one; and (5) that, at the time the agreement was prepared and executed, Engel was so far under the influence of intoxicating liquors as to incapacitate him to transact business.

Issues were joined, and the cause was tried to the court with a jury. Special interrogatories were submitted to the jury and answered favorably to the defendant Engel, and these findings were approved and adopted by the court. From the judgment dismissing the complaint, plaintiffs appealed.

Practically the only contention made in this court is that the evidence does not sustain the findings. That there is not any substantial evidence to support some of the findings may be conceded at once; but it does not follow therefrom that [1, 2] plaintiffs are entitled to prevail upon this appeal. Specific performance is not granted as of right; but the application, in every instance, is addressed to the sound discretion of the court (*Interior Securities Co. v. Campbell*, 55 Mont. 459, 178 Pac. 582), and on appeal the question is, not whether every finding is sustained, but whether there is any correct finding which will support the judgment (*In re Williams' Estate*, 52 Mont. 192, Ann. Cas. 1917E, 126, 156 Pac. 1087).

If, as a matter of fact, Engel was so far under the influence [3] of intoxicating liquor, when he signed the contract, that he was incapable of giving his assent, then it is altogether immaterial what representations Babcock may have made, what facts he may have concealed, or whether the hotel property was worth more or less than the farming property; for under such circumstances the writing, though purporting to be a contract, would be wanting in one of the indispensable prerequisites of an enforceable agreement; that is to say, it would be voidable at the election of Engel when he became sober. It is therefore unnecessary to consider whether every one of the findings is supported by the evidence, and our investigation will be limited to two of them.

To specific inquiries the jury answered that on November 22, 1916, at the time the agreement was made and executed, [4] the defendant Chas. A. Engel was "so under the in-

fluence of intoxicating liquors as to deprive him of his powers of reasoning and render him unable to comprehend the consequences of his act in executing said agreement." And again the jury answered that the property to be conveyed by the plaintiffs would not "constitute a fair or adequate consideration for the property to be conveyed by the defendant."

Engel himself testified to the effect that, availing himself of his wife's absence from home, he had been indulging greatly to excess and had been drunk on November 21; that he drank heavily of whisky which he had at his home before he started for Ryegate on the morning of November 22; that immediately upon his arrival in the town he had four or five drinks of whisky and blackberry before he entered upon the negotiations with Babcock; that he was stupid and remembered but little of what transpired but did remember that he did not read the contract. There are surrounding facts and circumstances which tend to cast suspicion upon Engel's testimony when considered in its entirety, but upon the question of his intoxication he was corroborated abundantly.

Four other witnesses, each apparently disinterested, testified that at the time in question Engel was intoxicated, and of these two at least expressed the opinion that he was so far under the influence of alcoholic intoxicants that he could not comprehend the nature of his acts, or, in other words, that he was not qualified to transact business. An even greater number of witnesses testified on behalf of plaintiffs that, at the time in question, Engel was sober. So far as the evidence is disclosed to us by the printed record, it cannot be said that there is any circumstance which even tends to show inherent improbability in the story told by any of these witnesses, or which tends to cast suspicion upon its verity. The jury in the first instance, and the trial court thereafter, determined upon the credibility of the witnesses and the weight to be given to their testimony. The jury and the presiding judge each had the distinct advantage of seeing the witnesses on the stand, observing their demeanor, their apparent candor and fairness or lack of either, their apparent interest or absence of it, and from these circumstances either was much better

qualified to pass upon and appraise the evidence at its true value, than are the members of this court. But on appeal [5] from a judgment only we are not to pursue our inquiry further than to ascertain whether there is substantial evidence to support the findings above. This rule was adopted in the earliest days of the territory, and has been followed consistently from *Vantilburgh v. Black*, 2 Mont. 371, to the latest case in which the question was presented. (*Buhler v. Loftus*, 53 Mont. 546, 165 Pac. 601.)

Whatever else may be said of the conflicting evidence, it cannot be contended that there is not some substantial evidence to support the finding that at the time the contract was executed, Engel was intoxicated. The evidence touching the value of the respective properties is equally conflicting, but there is substantial evidence from which it might be determined that the property which Engel was to convey was worth approximately twice as much as the property which he was to receive.

By express declaration of our statute, inadequacy of [6] consideration is made a defense to an action for specific performance of a contract. (Sec. 6103, Rev. Codes; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.)

Intoxication *eo nomine* is not made a defense by the Codes, and there was a time in the history of our jurisprudence when courts refused to lend their aid to relieve one from the consequences of his own voluntary intemperance, but the doctrine of stultification has long since been abandoned. The courts do not now concern themselves so much with the question of intoxication as with the question of contractual capacity, and if in fact either party is not mentally capable of giving his free consent to the terms disclosed by the writing, it is altogether immaterial by what cause his incapacity was produced. The courts have simply recognized the fact that intoxication, among other things, may render a person incapable of making a binding contract.

In considering intoxication as a ground for rescission, *Black on Rescission and Cancellation*, section 278, says: "Generally it has been thought that it was not necessary to prove

an entire loss of reason or to show that the person was entirely demented by drink. The test approved by the great majority of the decisions is the same which is applied in other forms of mental derangement, namely, that the deed or contract will be voidable if the person, at the time of its execution, was so far under the influence of intoxicants as to be unable to understand the nature and consequences of his act, and unable to bring to bear upon the business in hand any degree of intelligent choice and purpose."

Under our statute, if the defense of intoxication alone is relied upon, the question presented is this: Was the party so far under the influence of intoxicating liquors as to render him incapable of giving his consent? And this is true for the reason that, to constitute a binding bilateral agreement, the parties must have given their free and voluntary assent [7] to the terms. (Secs. 4966, 4971, Rev. Codes.) The question is one of fact, to be determined from all the evidence. (14 Cyc. 1104.)

The courts have held quite uniformly that, whenever the [8] element of inadequacy of consideration is coupled with the defense of intoxication, a less stringent rule with respect to the burden of proof will be applied, upon the theory that one party will not be permitted to invoke the aid of a court of equity to assist him in compelling the performance of a contract whose terms are, as to his adversary, unjust, when such terms were exacted while the adversary was laboring under the influence of intoxicants, by reason whereof he was more easily influenced into a bad bargain, and less able than he would be when sober, to protect his own interests. (36 Cyc. 614; *Swan v. Talbot*, 152 Cal. 142, 17 L. R. A. (n. s.) 1066, 94 Pac. 238.)

The defense of inadequacy of consideration was pleaded, with the defense of latent defects in the hotel property; but [9] there was not any motion made to compel defendant to separately state and number it. The issue was tried as though it was properly before the court; each party introduced evidence concerning it; the special interrogatory was submitted without objection, and after it had been answered

by the jury as indicated above, plaintiffs moved the court to disregard the answer and return an answer to the effect that the consideration was adequate. Under these circumstances it is now too late for appellants to urge that the issue was not raised by the pleadings.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

BEADLE, APPELLANT, v. HARRISON, RESPONDENT.

(No. 4,226.)

(Submitted November 18, 1920. Decided December 6, 1920.)

[194 Pac. 134.]

Malicious Prosecution—Complaint—Sufficiency—Defenses—Burden of Proof—Malice—Presumptions—Conflict in Evidence—Directed Verdict—When Error—Default Judgments—Setting Aside.

Default Judgment—Setting Aside—Discretion.

1. A stronger showing of abuse of discretion should be made to warrant a reversal where the trial court has opened a default than where it has refused to do so, the courts favoring a trial on the merits.

Same—When Order Proper.

2. Where there has been a reasonable excuse for a default offered with reasonable diligence, the motion to vacate it should be granted and trial on the merits had.

Malicious Prosecution—Evidence—Inadmissibility.

3. The defendant in an action for malicious prosecution may not be permitted to testify that he disclosed to an officer all the facts and circumstances, out of which the criminal prosecution against plaintiff arose, without stating what they were.

Advice of counsel as defense to an action of malicious prosecution, see notes in 1 Ann. Cas. 932; 11 Ann. Cas. 954; Ann. Cas. 1912D, 423.

Malicious prosecution, is the question of probable cause for the court or for the jury, see notes in L. E. A. 1915D, 1; Ann. Cas. 1912C, 1043.

The question as to when malice may be inferred in action for malicious prosecution is discussed in a note in 9 L. E. A. (n. s.) 1087.

What constitutes malice as element of malicious prosecution, see note in 21 Ann. Cas. 756.

Same—Evidence—Erroneous Admission—Harmless Error.

4. Error in permitting defendant in action for malicious prosecution to state generally that he made a full and fair disclosure of the facts to a justice of the peace, without stating what they were, was harmless where it appeared that arrest was not made pursuant to any statement so made, but that proceedings before the justice were abandoned and a new action instituted after consultation with the county attorney.

Same—Evidence—Good Faith in Instituting Criminal Action.

5. A question asked defendant whether, at the time he made complaint to a justice of the peace and interviewed the county attorney relative to the larceny of a horse by plaintiff in an action for malicious prosecution, he believed in good faith that the latter had stolen the animal, was not objectionable as calling for a conclusion.

Trial—Testimony Impeaching Witness—When Proper.

6. Testimony as to alleged statements of plaintiff tending to discredit his statements on the stand, *held* properly admitted, the proper foundation having been laid, and the evidence tending to impeach plaintiff.

Malicious Prosecution—Complaint—Sufficiency—What Matter of Defense.

7. A complaint for malicious prosecution, alleging the commencement of the criminal prosecution against the plaintiff at the instigation of the defendant, want of probable cause, malice, favorable termination, and the amount of damages, states a cause of action, it not being incumbent upon plaintiff to negative consultation with counsel and a full disclosure of the facts, this being a matter of defense.

Same—Burden of Proof.

8. In an action for malicious prosecution, the burden is on the plaintiff to prove that the defendant acted maliciously and without probable cause.

Same—Malice—Presumptions.

9. In an action for malicious prosecution, malice may be presumed in the absence of probable cause.

Same—Defense—Probable Cause.

10. Defendant in an action for malicious prosecution may make out a complete defense of probable cause by showing that he submitted to counsel a statement conforming to the legal requirements concerning the guilt of the accused, that in good faith he received advice justifying the prosecution and acted on that advice in instituting the proceedings complained of, and on such a showing he is entitled to immunity, although it may appear that the facts did not warrant the advice, or that the accused was innocent.

Same—Conflict in Evidence—Directed Verdict for Defendant—Error.

11. Where the evidence in an action of the nature of the above was in sharp conflict on the issues involved, the court committed error in directing a verdict for defendant.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

ACTION by F. B. Beadle against E. E. Harrison. From a judgment for defendant and an order denying his motion for a new trial, plaintiff appeals. Reversed and remanded.

Messrs. Grimstad & Browne, for Appellant, submitted a brief; *Mr. O. K. Grimstad* argued the cause orally.

The defendant in an action of this kind cannot testify to the fact that he has told all the facts to the attorney, or that he has not concealed anything, nor can he testify to the fact that he believed the defendant guilty. These are matters entirely for the jury to determine upon the facts and circumstances. (*Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303; *Lansky v. Prettyman*, 140 Mich. 40, 103 N. W. 538; *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Colo. App. 190, 48 Pac. 663; *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Ross v. Kerr*, 30 Idaho, 492, 167 Pac. 654.)

In considering whether or not there was probable cause, the facts in evidence bearing upon the question of whether or not such a state of facts existed as would lead a man of ordinary care and prudence to believe that the defendant did believe that a crime had been committed and that the plaintiff had committed it must be taken into consideration. (*Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.) As to the question of fraud, when there is no conflict in the evidence, no disputed facts nor any doubt upon the evidence, the inference to be drawn from it is one of law to the court and not one of fact to the jury; but upon a doubtful state of facts, the question is addressed to the jury. (*Ross v. Kerr*, *supra*; *Heyne v. Blair*, 62 N. Y. 19; *Galley v. Brennan*, 216 N. Y. 118, 110 N. E. 179; *Orefice v. Saverese*, 61 Misc. Rep. 88, 113 N. Y. Supp. 175; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728.)

Under the law, it is necessary for the defendant to show that he made a full and fair disclosure of all of the facts within his knowledge to a counsel learned in law. If he had reason to believe that there were other facts bearing upon the question of the guilt or innocence of the accused, these facts,

likewise, must have been disclosed to the attorney, and if there were facts which, with reasonable diligence could have been found, they likewise should have been disclosed to the attorney, and it was for the jury under all circumstances to determine whether or not the defendant made a fair and full statement of the facts which were known to him. (*Hess v. Oregon German Baking Co.*, 31 Or. 503, 49 Pac. 803; *Dunlap v. New Zealand Fire & M. Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Grorud v. Lossel*, 48 Mont. 274, 136 Pac. 1069; *Brooks v. Bradford*, 4 Colo. App. 410, 36 Pac. 303.)

Even if the record discloses the fact that the defendant told the attorney all the facts which he knew, or which he could, with reasonable diligence, have acquired, it was still a question for the jury to determine whether or not the defendant acted upon it in good faith, believing that the plaintiff was guilty of the offense charged. (*Seabridge v. McAdam*, 108 Cal. 345, 41 Pac. 409.) The court cannot direct a verdict where it appears that on any reasonable view of the evidence the facts established would warrant a verdict. (*Stewart v. Stone & Webster Engineering Co.*, 44 Mont. 160, 119 Pac. 568; *McCabe v. Montana Cent. Ry. Co.*, 30 Mont. 323, 76 Pac. 701.)

Messrs. Nichols & Wilson and *Messrs. Young & Young*, for Respondent, submitted a brief; *Mr. Harry L. Wilson* argued the cause orally.

It is urged that the question whether or not Harrison had "probable cause" for procuring Beadle's arrest was one for the jury. With this contention we take issue under the circumstances of this case. On this phase of the case counsel have cited a considerable number of authorities which merely support the general rule that when there is a substantial conflict in the testimony as to the facts relied upon, either to establish probable cause or the want of probable cause, then the question, like any other disputed question of fact, becomes one for the consideration of the jury. But as stated in the appellant's brief, "when there is no conflict in the

evidence, no disputed facts, nor any doubt upon the evidence, the question of probable cause is one of law for the court and not one of fact for the jury." (*Ross v. Kerr*, 30 Idaho, 492, 167 Pac. 654.)

Where one before the commencement of a criminal prosecution in good faith discloses to the prosecuting attorney all the facts within his knowledge, or which he has reasonable ground to believe, relating to the offense, and is advised to institute the prosecution, he is not liable as having acted without probable cause, though there were other exculpatory facts which he might have ascertained by diligent inquiry. (*Hess v. Oregon German Baking Co.*, 31 Or. 503, 49 Pac. 803; *Putnam v. Stalker*, 50 Or. 210, 91 Pac. 363; *Saunders v. Baldwin*, 112 Va. 431, Ann. Cas. 1913B, 1049, 34 L. R. A. (n. s.) 958, 71 S. E. 620; *Smith v. Austin*, 49 Mich. 286, 13 N. W. 593; *Johnson v. Miller*, 69 Iowa, 562, 58 Am. Rep. 231, 29 N. W. 743; *Dunlap v. New Zealand Fire & M. Ins. Co.*, 109 Cal. 365, 42 Pac. 29; *Ball v. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. 937; *Smith v. Liverpool etc. Ins. Co.*, 107 Cal. 432, 40 Pac. 540; *Monaghan v. Cox*, 155 Mass. 487, 31 Am. St. Rep. 555, 30 N. E. 467; *St. Johnsbury etc. R. Co. v. Hunt*, 59 Vt. 294, 7 Atl. 277.) In the case of *Smith v. Liverpool etc. Ins. Co.*, *supra*, it is held that in an action for malicious prosecution it is for the court to determine whether certain admitted or clearly proven facts constituted probable cause.

In support of the general rule that advice of counsel, and particularly of the public prosecutor, based upon a full and fair statement of the facts as known or understood by the complainant, is a complete defense to an action for malicious prosecution, innumerable authorities will be found in the very exhaustive notes to the following cases: *Shea v. Cloquet Lumber Co.*, 92 Minn. 348, 1 Ann. Cas. 930, 100 N. W. 111; *King v. Apple River Power Co.*, 131 Wis. 575, 120 Am. St. Rep. 1063, 11 Ann. Cas. 951, 111 N. W. 668; *Nance v. Cash*, 143 Ky. 358, Ann. Cas. 1912D, 422, 136 S. W. 619; *Van Meter v. Bass*, 40 Colo. 78, 18 L. R. A. (n. s.) 49, 90 Pac. 637.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an action for damages for malicious prosecution growing out of a criminal proceeding, instigated by Harrison, in which Beadle was accused of the larceny of a horse, arrested in the state of Iowa, and returned for trial. The criminal prosecution was dismissed on motion of the county attorney, after the commencement of the trial.

Service of the summons and a copy of the complaint herein was had on the defendant, on September 26, 1916. No appearance having been made within the statutory time, default was entered. On motion of the defendant, based on affidavits, the court opened the default and permitted the defendant to file his answer, admitting the instigation of the prosecution and its termination in favor of plaintiff, but denying want of probable cause and malice and affirmatively alleging probable cause and action on the advice of the county attorney, after a full and fair disclosure of all of the facts.

The cause was tried to a jury, and at the close of the case the court, on motion of counsel for the defendant, instructed the jury to return a verdict in favor of the defendant. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

1. Plaintiff first contends that the court erred in sustaining the motion to open the default. We have examined the record, and cannot say that the same discloses an abuse of discretion which would warrant this court in reversing the ruling of the trial court. Upon a similar showing, a like order was sustained in the case of *Voelker v. Golden Curry Min. Co.*, 40 Mont. 466, 107 Pac. 414.

A stronger showing of an abuse of discretion should be made [1, 2] to warrant a reversal where the trial court has opened a default than where it has refused to do so, for the courts almost universally favor a trial on the merits, and where there has been a reasonable excuse for the default offered with reasonable diligence, such a trial should be had. (*Farmers' Co-operative Assn. v. Roper*, 57 Mont. 48 (on motion for rehear-

ing), 188 Pac. 141; *Collier v. Fitzpatrick*, 22 Mont. 553, 57 Pac. 181; *Greene v. Montana Brewing Co.*, 32 Mont. 102, 79 Pac. 693; *Westphal v. Clark*, 46 Iowa, 263.)

2. The second specification predicates error on the court's [3-5] action in overruling plaintiff's objections to two questions propounded to the defendant. First: "You went down to Custer and informed the justice of the peace of the facts you then possessed?" Second: "At the time you made the complaint to the justice of the peace at Custer, and at the time you interviewed the county attorney in Billings, did you not believe in good faith that this man Beadle had stolen this horse and was guilty of larceny?"

If the first question was intended, as counsel contend it was, to elicit the answer that the complaining witness made a full and fair disclosure of the facts, without stating what facts he disclosed, the objection was well taken, for a complaining witness is not permitted to testify that he related all of the facts and circumstances, without stating what they were. (*Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122; *Ross v. Kerr*, 30 Idaho, 492, 167 Pac. 654.) However, if error was committed, it was not material, for the record discloses that the arrest was not made pursuant to any statement made by Harrison to the justice of the peace at Custer, but, after the proceedings there had been abandoned and a new action instituted at Billings, after consultation with the county attorney.

The second question does not call for a conclusion, but for the statement of a fact as to the belief of the witness and was not open to the objection urged.

The question set out in the fifth specification is of like nature, and the objection thereto was properly overruled.

3. The third specification is that the court erroneously [6] permitted a witness to testify to alleged statements of the plaintiff which would tend to discredit his testimony on the stand. The proper foundation was laid, and the evidence did tend to impeach the plaintiff, and was therefore properly admitted.

4. A witness was permitted to testify that a certain note was fully paid by Harrison. It is contended that the testimony was immaterial, and its admission constitutes error. Both parties were permitted to go at length into their financial transactions, and, if any of the evidence was material, no error was committed.

5. The sixth assignment is that the court erred in sustaining defendant's motion for directed verdict and in directing the jury to return a verdict for defendant. The motion is based on two grounds: (a) That the complaint does not state facts sufficient to constitute a cause of action; and (b) that the evidence is not sufficient to warrant a verdict in favor of the plaintiff.

(a) The complaint alleges the commencement of the criminal [7] prosecution against the plaintiff, at the instigation of the defendant, want of probable cause, malice, favorable termination, the damage suffered, and the amount thereof, and was therefore sufficient to state a cause of action. (*Stephens v. Conley*, 48 Mont. 352, Ann. Cas. 1915D, 958, 138 Pac. 189.) The plaintiff was not called upon to negative consultation with proper counsel and a full and fair disclosure of the facts, as that is purely a matter of defense.

(b) The only contention as to the evidence, made either in the brief or argument of counsel for appellant, is that "Nowhere in the testimony of Mr. Harrison is there any showing that he disclosed that he had borrowed money from Mr. Beadle, nor did he disclose to the county attorney the names of the witnesses in the case; nor was there any testimony to show that Mr. Harrison had disclosed to the county attorney that Mr. Beadle had used the horse and ridden it around the country, or that he had taken this horse, with some other horses, over to the farm which he [Beadle] had leased."

All these matters were immaterial, and would tend neither to prove nor disprove the guilt of the accused, and if they were the only matters to be considered, we would have no hesitancy in affirming the ruling of the court in this particular; but the motion on which the court acted challenges the entire

record of the testimony, and we must determine from the transcript thereof whether the court was justified in taking the case from the jury.

In an action for malicious prosecution, the burden is on the [8] plaintiff to prove that the defendant acted maliciously and without probable cause. (*Weaver v. Montana Cent. Ry. Co.*, 20 Mont. 163, 50 Pac. 414; *Grorud v. Loss*, 48 Mont. 274, 136 Pac. 1069; *Stephens v. Conley*, *supra*.) This burden the plaintiff assumed, and for the purpose testified on direct examination that he and defendant came to Montana together; that on the way he loaned defendant \$50, which was to be repaid after they reached their destination. He then testified: "The money was not paid back to me until I bought the horse at Melstone, in the stockyards. * * * Johnnie McIntire was there, and he owned the horse in question, and I looked at this horse, and I wanted to buy it. Mr. Harrison looked at it, and said he did not want to buy it; it was too small. I ain't buying it for anybody else but for myself, I want him, he is big enough for me, so I bought the horse and told McIntire, I says, 'Mr. Harrison will be along in a few minutes, and I will make him give me a check for the horse.' You see he hadn't given me a check up to that time, so when he came along I says to him, 'Mr. Harrison, give Johnnie McIntire a check for \$50 for this horse and saddle—I bought him and pay for him—and charge it to me,' which he did."

Plaintiff also related a purported conversation with defendant, in the presence of one Boyd Cabeen, stating: "Mr. Harrison made the proposition that he would run me a horse-race, one horse for the other. I said, 'I ain't that sporty; I know your horse is better than mine.' " Cabeen on the witness-stand corroborated him. Again, on cross-examination, having testified that Harrison owed him money at the time he went to Iowa, plaintiff stated: "Why no, that had nothing to do with my taking the horse away with me. I took the horse because it was my horse, I sold him and got the money—sold the same as I would sell a jackknife or anything else that belonged to me. * * * The alleged indebtedness between

Harrison and me had nothing to do with my selling the horse.”

This evidence, if uncontradicted, was sufficient to establish [9] want of probable cause, and from the absence of probable cause malice may be presumed. (*Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33; *Grorud v. Lossl*, *supra*.) The plaintiff thus made out a *prima facie* case. In *Martin v. Corscadden*, this court said: “All the books agree that the plaintiff must prove both want of probable cause and malice, and that, where the absence of the former is established, the presence of the latter may be inferred. In other words, when the proof tends to show the absence of the former, a *prima facie* case is made for the jury. The burden then rests upon the defendant to rebut the *prima facie* case; and this he must do by any evidence tending to show the existence of probable cause and the want of malice on his part.” The defendant, it is true, met this requirement by claim- [10] ing absolute ownership of the horse, detailing the circumstances of its purchase and a denial of all the statements of plaintiff and his witness, and by the affirmative defense that he fully and fairly and in good faith disclosed all of the facts to the county attorney. If his version of the transaction is true, he made out a complete defense, for “it is the general rule that in an action for malicious prosecution defendant may make out a complete defense of probable cause by showing that he submitted to proper counsel a statement conforming to the legal requirements concerning the guilt of the accused; that in good faith he received advice justifying the prosecution, and acted on that advice in instituting the proceedings complained of; and that, if he showed these things, he is entitled to immunity from damages, although it may appear that the facts did not warrant the advice, or that the accused was innocent.” (32 Cyc. 31.)

On the other hand, if the plaintiff's version is correct, that [11] evidence tends to establish, not only want of probable cause and malice, but it tends also to prove that the defendant did not, in good faith, make a full and fair statement of all the facts to the county attorney, for we must assume that he knew that the horse belonged to the plaintiff, and that the

plaintiff had not stolen it. The evidence thus presents a sharp conflict between the statements of the plaintiff and defendant, and its credibility, with the inferences justly deducible from it, was a question for the jury. (*Martin v. Corscadden; Gro-rud v. Lossel, supra.*) It is therefore clear that the court erred in instructing the jury to return a verdict for the defendant.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-WAY, HURLY and COOPER concur.

CASES DETERMINED
IN THE
SUPREME COURT
AT THE
DECEMBER TERM, 1920.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, THE HON. JOHN HURLY, THE HON. JOHN A. MATTHEWS, THE HON. CHARLES H. COOPER,	}	Associate Justices.
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**EMERSON-BRANTINGHAM IMPLEMENT CO., APPEL-
LANT, v. ANDERSON, RESPONDENT.**

(No. 4,210.)

(Submitted September 24, 1920. Decided December 13, 1920.)

[194 Pac. 160.]

*Mortgages — Foreclosure — Cancellation of Instruments —
Fraud—Undue Influence—Burden of Proof—Consideration.*

Fraud—Essentials.

1. To make out a case for relief on the ground of fraud, it must appear that the party against whom the fraud is alleged made a misrepresentation of a material fact, with intent to induce the other party to act upon it, and that the latter believed, and relied and acted upon it to his damage.

Same—What Does not Constitute.

2. A misrepresentation or opinion expressed by one to another as to the law relative to their respective rights in the matter which is the subject of negotiations is not a fraudulent misrepresentation.

Right to have money obligation canceled in action for damages for fraud in inducing contract, see note in 3 A. L. B. 74.

Opinion on question of law by party to contract for sale of land as sufficient basis to support charge of fraud, see note in Ann. Cas. 1913B, 1143.

Undue influence as related to fraud, see note in 18 Ann. Cas. 412.

Same—Misrepresentation as to Law—When Fraud.

3. If a relation of trust and confidence exists between parties, a misrepresentation or opinion by the party in whom the trust and confidence is reposed as to what the law is, if made for the purpose of deceiving the other or gaining an unconscionable advantage over him, constitutes a ground for relief.

Same.

4. If one who knows the law deceives another by misrepresenting it to him and, knowing him to be ignorant of it, takes advantage of him by reason of his ignorance, an action for fraud lies.

Same—Expression of Opinion.

5. A statement merely as to what the party making it intends to do is not a misrepresentation, since it is not an affirmation of a fact but only an assertion of a present mental condition or opinion existing in him.

Same—What not Fraudulent Representation.

6. A representation by the agent (an attorney) of plaintiff implement company, chattel mortgagee, to the mortgagor's widow and executrix that if she refused to give additional security the mortgage would be foreclosed and certain of her own property taken to satisfy it, was merely the statement of an intention and not the affirmation of a fact, did not amount to a fraudulent representation, though the maker of it must have known that the latter part thereof could not be carried out, a fiduciary relation not existing between him and her, and was insufficient to invalidate a mortgage thereafter given by her on the ground of fraud.

Same.

7. The statement by plaintiff's agent in endeavoring to persuade defendant to furnish additional security for a chattel mortgage theretofore executed by her deceased husband, that he could not see why she, apparently capable of taking care of her own business, needed anybody's advice, was a mere expression of his opinion as to her business capacity, and not one upon which to base a charge of fraud.

Same.

8. Where a testator's will provided that his widow, and executrix, should have full power to sell and dispose of his property for any purpose without order of court, a representation by plaintiff's agent (an attorney) that she had such power, being true, could not be characterized as fraudulent.

Contracts—Undue Influence—Cancellation—Essentials.

9. Under section 4981, Revised Codes, to make the defense of undue influence available, the party alleged to have exercised such influence over another in the execution of a contract must have occupied a superior position with reference to the other by reason of a real or apparent authority over him arising out of pre-existing relations, or assumed at the time because of the weakness of mind, distress or necessities of the other, by reason of which he knowingly gained an unconscionable advantage.

Same—Undue Influence—Burden of Proof—Contracts—Validity—Presumptions.

10. Since the law presumes that a contract fair on its face was the result of the voluntary act of the parties to it, the burden is on him who seeks release from an obligation, apparently voluntarily assumed, on the ground of undue influence, to show by a preponderance of the evidence that it was induced by such predominating influence exerted over him as to preclude the presumption that he acted from free choice.

Same—Undue Influence—Burden of Proof Shifts, When.

11. Where antecedent confidential relations are shown so as to create a presumption of undue influence, the burden shifts to the adverse party to show that the negotiations resulting in the contract were conducted at arm's-length, uninfluenced by the superior position held by him.

Same—Undue Influence—What Does and What Does not Constitute.

12. Solicitation, importunity, argument and persuasion are not undue influence, and a contract may not be set aside merely because one party used such means to obtain the consent of the other; influence becoming undue only when the means employed work a dominion over the will of another to such an extent as to destroy free agency or to constrain him to do against his will what he is unable to refuse.

Same—Cancellation of Instruments—Undue Influence—Evidence—Insufficiency.

13. Where a chattel mortgagee's representative and the mortgagor's executrix were strangers, and no fiduciary relationship existed between them, and the executrix was not affected by any weakness of mind or laboring under any pressing necessity, a mortgage, executed by her on her own property on his solicitation, upon apparently due consideration, was not invalid for undue influence merely because it was given about two months after the death of her husband, when her grief had perhaps not entirely subsided.

Mortgages—Forbearance to Foreclose—Consideration.

14. Forbearance from foreclosing a mortgage executed by defendant's husband in his lifetime, held to have been a sufficient consideration for the execution of an additional one on property owned by her.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by the Emerson-Brantingham Implement Company against Nellie Anderson. Judgment for defendant and plaintiff appeals. Remanded with directions.

Messrs. McKenzie & McKenzie, for Appellant, submitted a brief; *Mr. John McKenzie* argued the cause orally.

The court erred in finding that defendant received no consideration for the notes and mortgage. "A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by another." (Norton on Bills and Notes, p. 256.) Thus we find the courts have held a sufficient consideration to be the forbearance of the debt of another, a promise to give up a bill thought to be invalid, or a debt,

barred by the statute of limitations, or debt discharged in bankruptcy. (*Id.*, p. 258; *Meltzer v. Doll*, 91 N. Y. 365.)

"An agreement to extend the time of payment of a debt is sufficient consideration for the execution by a third party of his note to the creditor, as collateral security for the payment of said debt." (*Nichols & Shepard Co. v. Dedrick*, 61 Minn. 513, 63 N. W. 1110; *Peterson v. Russell*, 62 Minn. 220, 54 Am. St. Rep. 634, 29 L. R. A. 612, 64 N. W. 555.) "A promise of forbearance to sue a third person for a certain time is a consideration sufficient to support a note." (3 R. C. L., sec. 136.) Defendant was the owner of the machinery on which deceased had given a mortgage, and she did not want it foreclosed. We therefore submit that the consideration for the notes and mortgage was the forbearance of plaintiff from foreclosing the mortgage given by Anderson. By giving the notes and mortgage sued on in this case, she secured further time for the payment of her husband's debt to plaintiff and relieved her property—the engine—from the possibility of foreclosure. Plaintiff surrendered the right and advantage to foreclose, and the defendant saved her property—the engine—from foreclosure; she gained further time, which was a sufficient consideration for the notes and mortgage under consideration. (*Ford v. Drake*, 46 Mont. 314, 127 Pac. 1019.) Under the decisions this was a sufficient consideration.

Mr. E. K. Cheadle and *Mr. Burton R. Cole*, for Respondent, submitted a brief; *Mr. Cole* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought on July 21, 1916, to foreclose a mortgage upon a lot situate in Great Falls, Cascade county, belonging to the defendant. The mortgage was given to secure the payment of two promissory notes executed by defendant to plaintiff on October 31, 1913, due and payable, respectively, on December 1, 1913, and November 1, 1914, with interest at eight per cent per annum, together with attorney's fees in case it should become necessary to bring action of

foreclosure. Recovery is also sought for the sum of \$15 expended by plaintiff for an abstract of title of the mortgaged property, which it is alleged is also secured by the mortgage.

In her answer defendant seeks affirmative relief by way of counterclaim, demanding cancellation of the notes and mortgage on the ground that they were obtained by fraud, undue influence and without consideration. The allegations of the answer, in so far as they are material, are substantially the following: That defendant is the widow of Stephen A. Douglas Anderson, deceased, who in his lifetime was indebted to plaintiff; that she is the executrix of his will; that the estate is insolvent; that one Weston Houghton and one G. A. McFarlane, plaintiff's authorized agents and representatives, on or about October 31, 1913, demanded of defendant that she execute to plaintiff the notes described in the complaint and the mortgage to secure them, in settlement of the indebtedness of the deceased; that she was not personally liable for any of the debts of the deceased; that to induce her to execute the notes and mortgage, plaintiff's said agents falsely and fraudulently represented to her that she was personally liable for the indebtedness due from the deceased to the plaintiff; that unless she should execute and deliver the notes and mortgage the plaintiff would enforce the payment of the indebtedness against her, and would seize and sell her separate property to satisfy it; that these representations were each and all of them false and fraudulent, as plaintiff's agents well knew, and that they were made for the purpose of defrauding defendant; that she endeavored to consult her attorney and ascertain whether the representations were true; that on said day her attorney was absent from his office in Lewistown, Fergus county, Montana, where she resides, and that she was not able to consult him; that the said agents did then and there represent to her that it was not necessary for her to consult an attorney; that they were men of large business affairs; that defendant was wholly unused to transacting business; that at that time she had been recently bereaved by the death of her husband; that she was in an overwrought, abnormal and depressed condition of mind because of the death of her husband,

and was unable to withstand the arguments and representations of the plaintiff's agents; that relying upon their false and fraudulent representations, and believing the same to be true, she yielded to their demands, and by reason of them made, executed and delivered to the plaintiff the notes and mortgage; that defendant discovered the falsity of the representations so made to her, on or about December 27, 1913; that she thereupon, through her attorney, made demand upon the plaintiff for the return to her of the promissory notes and for the satisfaction of the mortgage; that the plaintiff wholly failed and refused to comply with her request; and that the defendant received no consideration or thing of value of any kind, nature or character for the execution and delivery by her to the plaintiff of the notes and mortgage. The reply put in issue these allegations.

The court found the facts to be as alleged in the counter-claim, and concluded that the notes and mortgage were void for the reasons: (1) That the defendant was induced to execute them by reason of the false and fraudulent representations of plaintiff's agents; (2) that the plaintiff's agents secured the execution of them by means of undue influence exerted over the defendant; and (3) that she, not theretofore being indebted to the plaintiff, received no consideration for them whatever. Accordingly it rendered judgment, directing the plaintiff to cancel the notes and to satisfy the mortgage of record. Plaintiff has appealed from the judgment, and presents the question whether the findings and decision are justified by the evidence.

At the time of his death, on September 4, 1917, Anderson was indebted to the plaintiff, evidenced by promissory notes, for the purchase price of a traction engine, to secure which he had executed upon it to plaintiff a chattel mortgage. This had been renewed from time to time up to July 1, 1913. It had been overdue since that time. By his will, Anderson bequeathed to defendant the residue of his estate after the debts had been paid, and conferred upon her "full and unlimited power to sell, convey, transfer and dispose of any or all of the property * * * for the purpose of paying my debts

or for any other purpose at any time after my death without obtaining an order of any court and without the intervention of any court whatever." On October 31, 1913, Houghton and McFarlane, agents of plaintiff, visited the defendant to obtain from her a settlement of the notes. They demanded payment of them. Defendant insisted that they take the engine in satisfaction of them, but they refused to do so, demanding that she should either pay them or furnish security. The following excerpts from her testimony disclose all the negotiations which then took place:

"They came in and said they came to get some settlement for this engine. * * * I told them I had nothing to pay them, and they could make some arrangement to take the engine back for what there was against it. He [McFarlane] said no, they wouldn't do that, they wanted some kind of security, but they didn't want no engine back. They wasn't in that line of business—they had engines to sell. They kept talking for quite a while. They said they would take security on a piece of land that I had. I told them that it was mortgaged before. They said they would be willing to take a second mortgage on that, and I told them I didn't want no more mortgages on it, and I would rather they would make arrangements, and I thought I could get permission from the court to turn the engine back to them for the amount that was due. I told them I didn't like to mortgage anything that I thought was my own property, and they said if I didn't give them some kind of security, they would foreclose on the mortgage and take enough other property to cover the expenses and everything concerning it. They mentioned my husband's homestead and desert. Q. You say they said if you did not give them a mortgage on something that they would foreclose on the engine? A. Yes, sir. Q. And then take enough other property to pay the balance? A. Yes. Q. Mentioning especially the homestead? A. Yes. The homestead and the desert—and other property to cover the amount there was to pay what was against the engine. They sat there an hour and a half, or something like that. I don't remember exactly. He [McFarlane] said he was in a hurry to get back, he wanted a set-

tlement and wanted to go back to Billings that afternoon, and he wanted to know what I was going to do. He said, 'You can study about it,' and he went downtown and they called me up in the afternoon and wanted to know what I was going to do. In the meantime, before he left, I said I wouldn't give him the mortgage on the land, but I had a lot in Great Falls, and if I had to give a mortgage on anything, I would rather give them security on that. He didn't like to take that because he said it wasn't worth very much, it wasn't big enough security. Then they called me up later in the afternoon and wanted to know what I was going to do, and I said, 'If I have got to, I suppose I have to rather than to have any trouble in foreclosing.' He came back, and had the mortgages all made out, and the notes, and I signed them. That was in the afternoon of the same day. I don't remember the exact hour.

Q. Did you believe at the time that you signed this mortgage and these notes that if you did not sign them the Emerson-Brantingham Implement Company would foreclose that old mortgage on the engine? A. I surely did, or I would not have signed it. Q. Did you believe if you didn't sign this mortgage and these notes that the plaintiff corporation would have taken your husband's homestead away from him [you]? A. I believe it might be they could. I didn't know the law, and he said the way my husband made his will he gave me the right to pay up the debts without any permission of the court or advice of any attorney. Said he didn't see why I needed the advice of anybody to look after the business myself. He said, 'I am an attorney myself, and I can't see why you need the advice of anybody; you look to me like a woman who is capable of taking care of your own business,' and when he said he was an attorney and seemed like—I thought he wouldn't be wanting to take everything away from a woman and a child.

* * * Q. Had you, in the meantime between the first and second visits, had you attempted to get any advice in the matter as to whether you would sign the mortgage? A. Yes, I called you [one of her counsel] up, and you wasn't at home or in your office. Q. So you actually signed these papers without any advice from anybody except Mr. McFarlane? A.

Yes, sir. * * * Q. What was the condition of your mind at that time? A. Well, its pretty hard to explain with words. I was very worked up, upset about his death; I had so much trouble. Q. Had you ever attended to the business affairs of the family during your husband's lifetime? A. No, sir; not of that kind. Q. Who attended to them? A. Mr. Anderson attended to the business. Q. How much experience had you had in business matters at that time? A. None at all at that time. Q. What, if anything, did Mr. McFarlane say as to your right to dispose of your husband's property, or exercise dominion over it? A. Well, he seemed to think that I could dispose of it as I pleased, with his property—after he gave his will in that way—I could pay up the bills, and the balance would be for myself. * * * Q. You stated a while ago that Mr. McFarlane stated that he was a lawyer? A. Yes, he said, 'I am an attorney myself, but I can't see why you need any permission or advice from any court, and you can go ahead and attend to his business without it.' That he thought—he threw the bouquet at me—that he thought I was a woman capable of looking after my own business, but he says, 'You can ask your attorney if you want to.''' In another part of her testimony she stated that she had found the indebtedness of the estate greater than she had anticipated, and that she did not think there was sufficient property to pay it.

The result of the negotiations was that the defendant renewed the chattel mortgage upon the engine, and in addition executed the mortgage and notes in controversy. McFarlane was dead at the time of the trial. Houghton was called as a witness, and testified in relation to the transaction, but his account did not differ materially from that of defendant, except that he testified that McFarlane told her that if she did not furnish the desired security the plaintiff would foreclose the old mortgage on the engine and take judgment for any deficiency which might remain unsatisfied.

The mortgage obligated the defendant, among other things, to pay all taxes assessed, or to be assessed, against the prop-

erty, and to keep any buildings thereon insured for the benefit of the plaintiff. It provided that in case the defendant defaulted "in any of the terms of said notes or of this mortgage," etc., or in the payment of any prior lien or encumbrance upon the property or taxes, etc., the plaintiff might pay such prior liens, taxes, etc., and that all sums so paid should bear interest at twelve per cent per annum from the date of their payments, and should become a part of the debt secured by the mortgage; "and that said sum or sums of money so paid and the notes and money hereby accrued [secured?] shall, at the option of said party of the second part, its successors or assigns, thereupon and without notice to said party of the first part or any other party, become immediately due and payable, anything herein or in said notes contained to the contrary notwithstanding, and the payment thereof may be enforced by foreclosure of this mortgage, by action, or advertisement or in any other manner; and said notes and sum or sums of money [to be?] paid as aforesaid shall draw twelve per cent per annum thereafter."

Upon an analysis of the account of the transaction as given by the defendant herself, without regard to the testimony of Houghton, we are of the opinion that under the rules of law applicable it furnishes no substantial basis for any of the conclusions reached by the trial court.

As to the alleged fraudulent representations: To make a case [1] for relief on the ground of fraud, it must appear with reasonable certainty that the party against whom the fraud is alleged made a misrepresentation of a material fact; that he made it with the intent to induce the other party to act upon it; that the latter believed and relied upon it; and that he acted upon it to his damage. (Rev. Codes, sec. 4978; *Buhler v. Loftus*, 53 Mont. 546, 165 Pac. 601, and cases cited.) A misrepresentation or opinion expressed by one of the parties [2] to the other as to what the law is relative to their respective rights in the matter, which is the subject of negotiations, is not a fraudulent misrepresentation within this rule. Everyone is presumed to know the law, and is bound to take notice of it. Hence neither party has a right to rely on such a rep-

resentation or opinion, and will not be permitted to say he was misled by it. (12 R. C. L., p. 295; 14 Am. & Eng. Ency. of Law, 2d ed., p. 54; Pomeroy's Equity Jurisprudence, sec. 877.)

[3] If, however, a relation of trust and confidence exists between the parties, a misrepresentation or opinion by the party in whom the trust and confidence is reposed as to what the law is, if made for the purpose of deceiving the other or of gaining an unconscionable advantage over him, forms an exception to the foregoing rule, and constitutes a ground for [4] relief. (12 R. C. L., p. 296.) So, also, if one who knows the law deceives another by misrepresenting it to him, and, knowing him to be ignorant of it, takes advantage of him by reason of his ignorance, this is a misrepresentation within the exception. Still another exception, recognized by some courts, is when the person to whom the representation is made relies upon the superior knowledge and experience of the other party, and upon a statement by him that it is not necessary for him to consult counsel. (12 R. C. L., p. 296; *Olston v. Oregon Water Power & R. Co.*, 52 Or. 343, 20 L. R. A. (n. s.) 915, 96 Pac. 1095, 97 Pac. 538.) A statement merely as to what the party [5] making it intends to do is not a misrepresentation, since it is not an affirmation of the fact, but is only an assertion that a present mental condition or opinion exists in him. (Pomeroy's Equity Jurisprudence, sec. 877.)

It is apparent from the testimony of the defendant that McFarlane acted as exclusive spokesman for the plaintiff. The representations made by him may be epitomized in brief as follows: (1) That if defendant did not give the plaintiff some [6-8] kind of security, it would foreclose the mortgage on the engine and take enough other property—mentioning the homestead and desert land—to pay any balance then left due; (2) that he was an attorney, and that he could not see why she, a woman who appeared to be capable of taking care of her own business, needed the advice of anybody; and (3) that under the terms of the will she could dispose of the property belonging to her husband's estate as she pleased, without the intervention of any court.

It will be observed that the defendant nowhere testified that she accepted these statements as true, and relied upon them, but merely stated that she would not have signed the notes and mortgage if she had not believed that, unless she should do so, the plaintiff would foreclose the mortgage. As to the possibility of plaintiff's seizing upon the homestead or desert land, she merely said, when questioned by her counsel: "I believe it might be they could. I didn't know the law, and he said the way my husband made his will, he gave me the right to pay the debts, without any permission of the court or advice of any attorney."

Whatever opinion one would be justified in entertaining as to the method pursued by McFarlane from an ethical point of view, the representations made by him, taken together with all the attendant circumstances, do not warrant the conclusion that he defrauded defendant. The first representation was merely the statement of an intention, and not the affirmation of a fact. Though the term covered by the mortgage had expired at the time the new mortgage and notes were executed, and, had Anderson been living, it would have been open to assault by any one of his creditors, yet, as between him and the plaintiff, the latter would have had the right to foreclose it in the absence of a statutory provision to the contrary. There is no such provision in this state, and therefore the life of the lien created by it continued until the debt secured by it became barred by the statute of limitations. (Jones on Mortgages, 5th ed., sec. 771.) The accident of Anderson's death did not destroy the lien. The defendant, by becoming executrix of his estate, was merely substituted in his place as his representative. Under other provisions of the Code applicable, the plaintiff had the option either to proceed to foreclose after presenting his claim (the notes) to defendant for allowance (Rev. Codes, sec. 7525), or, if it did not desire to do this, it could have proceeded to foreclose, without the right, however, of presenting a claim against the estate for any balance remaining due after foreclosure. (Rev. Codes, sec. 7532.) Though McFarlane must have known that it could not carry out in its entirety the intention so expressed by him, this,

under the rule stated on the subject *supra*, did not amount to a fraudulent representation. If the statement be considered as an expression of his opinion as to the extent of plaintiff's legal rights, it does not come within the exception to the rule *supra*, denouncing such statements as fraudulent, for no fiduciary relation existed between him and the defendant. Nor does it come within any of the other exceptions to the general rule. It does not appear that he took advantage of her ignorance of the law. After the first interview, when this opinion was expressed and she had refused to give the security, he went away, avowedly to give her an opportunity to consider his proposition and to consult her attorney, if she chose to do so, which he, in fact, suggested she should do. The second representation was a mere expression of his opinion as to defendant's business capacity. The third was literally true, for under the terms of the will she had full authority to sell and dispose of the property as she pleased, and she must have known that this was a fact. It may be observed, too, that the result of the negotiations was, not that she did what he insisted she should do, *viz.*, give a second mortgage on land belonging to the estate, but that she gave a mortgage on the Great Falls lot, as she first proposed to do, and this, too, so far as he knew, after fully considering the situation and consulting her attorney. He, therefore, did not knowingly take advantage of her ignorance.

As to undue influence: Under the statute, undue influence [9] consists: "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him. 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and an unfair advantage of another's necessities or distress." (Rev. Codes, sec. 4981.) To meet the requirements of this definition, the one party to the negotiations must occupy a superior position with reference to the other by reason of a real or apparent authority he holds over him, arising out of pre-existing relations, or assumes at the time because of the weakness of mind or distress or necessities

of the other, by reason of which he knowingly gains an advantage, which in contemplation of law is unconscionable. Whether a court of equity will use its power to release the complaining party from an obligation apparently assumed by him depends upon the facts of the particular case. In either case, the court starts out with the presumption that a contract, [10] fair on its face, is valid, and is the result of the voluntary act of both parties. The law recognizes the right of every person, when not hindered by personal incapacity or some provision of law, to act according to his own free choice. It therefore casts the burden upon him who seeks release from an obligation apparently voluntarily assumed by him, to show by a preponderance of the evidence that its assumption was not his voluntary act; in other words, that it was induced by such predominating influence exerted over him by the other party as to preclude the presumption that he acted from free choice. "Where an antecedent fiduciary relation exists, a [11] court of equity will presume confidence placed and influence exerted; where there is no such fiduciary relation, the confidence and influence must be proved by satisfactory extrinsic evidence; the rules of equity and the remedies which it bestows are exactly the same in each of these two cases." (2 Pomeroy's Equity Jurisprudence, 951.)

The presumption referred to by Mr. Pomeroy arises only when it is shown that antecedent relations between the parties in fact existed. When the presumption does arise, the burden shifts to the adverse party to repel it by showing that the negotiations resulting in the contract were conducted at arm's-length, uninfluenced by the superior position held by him. The [12] law recognizes a distinction between what may be deemed "due influence," which is entirely legitimate, and what the statute denounces as "undue influence." On this subject, Mr. Lawson, in his article on Contracts found in 9 Cyc. 455, states the distinction thus: "Solicitation, importunity, argument and persuasion are not undue influence, and a contract is not to be set aside merely because the one party has used these means to obtain the consent of the other. Influence obtained by persuasion and argument, or by appeals to the

affections is not prohibited either in law or morals and is not obnoxious even in courts of equity, and may be termed 'due influence.' Nor is the case changed because the parties stand in confidential relations to each other. The line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice. But, on the other hand, influence attained by flattery, importunity, superiority of will, mind, or character, which gives dominion over the will of another to such an extent as to destroy free agency or to constrain him to do against his will what he is unable to refuse, is such influence as equity condemns as undue."

Bearing in mind these general principles, let us examine the [13] facts as testified to by the defendant. McFarlane and the defendant were strangers. Therefore no antecedent fiduciary relation existed between them, nor did McFarlane hold any real or apparent authority over her. The defendant was not affected by any weakness of mind. Her testimony evinces the contrary. Neither was she laboring under any pressing necessity. There is nothing in her testimony to indicate this. Evidently the court reached the conclusion it did upon the theory that McFarlane took advantage of her distress of mind due to the death of her husband, and thus induced her to enter into what it regarded as a grossly unfair bargain. The only fact stated by her in this connection was her statement, by way of conclusion: "I was very worked up, upset about his [her husband's] death; I had so much trouble." Let it be conceded that after the lapse of some two months from the death of her husband, her grief had not entirely subsided: Does it follow, as a matter of law, and for this reason alone, that her contract, fair on its face, entered into while she was in this condition, should be declared unconscionable? As we have said, the evidence does not convict McFarlane of fraud. Under the rule laid down by Mr. Lawson, *supra*, we do not think

he transcended the line of distinction between due and undue influence. On the contrary, it appears that the negotiations were conducted at arm's-length. She did not act upon a momentary impulse, but upon apparently due consideration, after a flat refusal in the first place to act at all. The consideration that impelled her evidently was that, if she could obtain delay, she might prevent foreclosure proceedings, and in the meantime put herself in position to pay the debt, and thus save the engine.

As to the consideration: Consideration is "any benefit conferred or agreed to be conferred upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor * * * ." (Rev. Codes, sec. 5001.)

It is not necessary to cite any authority to support the conclusion that the forbearance accorded to the defendant under the [14] terms of the contract was sufficient to sustain it. All the authorities, though expressing the rule in varying terms, agree in substance with the statements contained in the section of the statute *supra*. To be sure, the result may be considered a hard bargain, in that the defendant assumed liability for a debt for which she was not liable in the first place, but it is not the office of courts to make bargains for parties, but to enforce them in all cases; their only legitimate inquiry being whether such bargain has in fact been made.

The cause is remanded to the district court, with direction to set aside the findings and judgment in favor of defendant, and to make findings in favor of plaintiff and render judgment accordingly.

Remanded with directions.

ASSOCIATE JUSTICES HOLLOWAY, HURLY, MATTHEWS and COOPER concur.

MORGAN, RESPONDENT, v. BUTTE CENTRAL MINING &
MILLING CO. ET AL., APPELLANTS.

(No. 4,651.)

(Submitted November 22, 1920. Decided December 13, 1920.)

[194 Pac. 496.]

Workmen's Compensation—Industrial Accident Board—Findings—When Conclusive—Dependency.

Appeal and Error—Evidence—Findings—When not Conclusive.

1. *Held*, that the rule under which the supreme court will not reverse the findings of the district court except where the evidence clearly preponderates against them does not obtain where the findings were made by the district court upon the same record presented for review on appeal, since then the appellate court is in as advantageous a position to determine their correctness as was the trial court in making them.

Workmen's Compensation—Appeal to District Court—Findings of Industrial Accident Board—When Conclusive.

2. On appeal to the district court from an award made by the Industrial Accident Board under the provisions of the Workmen's Compensation Act (Chap. 96, Laws 1915), tried upon the record made before the board, the court should not reverse the findings of the board unless the evidence clearly preponderates against them, the board having been in better position to determine of the credibility of the witnesses and the weight to be given to their testimony than can the court from an inspection of the record.

Same—Dependency—What not Evidence of.

3. Voluntary contributions made by a workman during his lifetime to one claiming benefits under the Workmen's Compensation Act as a minor dependent are not necessarily evidence of dependency.

Same—Dependency—How Determined.

4. In determining whether one was a dependent within the meaning of the Workmen's Compensation Act, the Industrial Accident Board is not concerned with problematical future conditions, but only with the condition of the claimant (dependent) at the time of the injury to decedent and for a reasonable period prior thereto.

Same—Who is not "Dependent."

5. One claiming benefits accruing to him as a "minor dependent" can do so only when he is an invalid, i. e., one who is physically and mentally incapacitated; if he is able to support himself by his own efforts in any branch of physical or mental endeavor, he cannot be said to be "incapacitated."

Review of facts on appeal under Workmen's Compensation Act, see notes in Ann. Cas. 1916B, 475; Ann. Cas. 1918B, 647.

Review of facts on appeal from decision of intermediate appellate court reversing on facts, see note in Ann. Cas. 1918D, 1205.

Who is dependent within Workmen's Compensation Act, see notes in Ann. Cas. 1913E, 480; Ann. Cas. 1918B, 749.

PROCEEDING by P. F. Morgan under the Workmen's Compensation Act to obtain compensation as a dependent for the death of a brother, Edward Morgan, opposed by the Butte Central Mining & Milling Company, the employer, and the Guardian Casualty & Guaranty Company, the insurer. An order denying compensation was reversed by the district court, and the employer and insurer appeal. Reversed and remanded, with directions to enter judgment in accordance with the findings of the Industrial Board.

Messrs. Kremer, Sanders & Kremer, for Appellants, submitted a brief; *Mr. Alf. C. Kremer* argued the cause orally.

(NOTE.—The cases cited by appellants being practically all incorporated in the opinion, it is deemed unnecessary to include them in the brief.)

Messrs. Galen & Mettler and *Mr. E. G. Toomey*, for Respondent, submitted a brief; *Mr. Frank W. Mettler* argued the cause orally.

Strictly speaking, claimant, at the very instant of his brother's death, may not, for a brief twenty-four hours, have been dependent upon him. Such a construction, however, would make the act but a skeleton of statutory sections hung together by empty words. The law does not intend to synchronize the employee's death and the dependent's activities with the nicety of a chronometer. It is held "that money which comes to a dependent by the death of a workman does not affect the question of whether or not he is dependent upon his earnings at the time of the death of the workman; that what the law intends is the condition immediately before the death of the workman." (*Price v. Penrikyber Colliery Co.*, 85 L. T., 4 W. C. C. 115; *State ex rel. City of Duluth v. District Court of St. Louis Co.*, 134 Minn. 28, Ann. Cas. 1918B, 635, 158 N. W. 791; *State ex rel. Crookston L. Co. v. District Court of Beltrami County*, 131 Minn. 27, 154 N. W. 509.) Therefore, any moneys that claimant herein received after July 12, 1916, the date of the injury and death of Ed. Morgan, decedent, cannot, according to the authorities just cited, affect the ques-

tion of whether or not claimant was dependent upon the earnings of the decedent at the time of his death, assuming that by any construction such evidence negatives the dependency of claimant. Section 24 (a) of the Montana Compensation Act provides: "Whenever this Act, or any part or section thereof is interpreted by a court, it shall be liberally construed by such court."

A person may be wholly dependent on the employee, although he receives occasional gratuities from others, or although he may have some slight savings of his own, or some other slight property or source of revenue, but not where he has any substantial and independent means of his own, or where the contributions of the deceased went merely to augment the savings of the family. (*State v. Hennepin County District Court*, 128 Minn. 338, 151 N. W. 123; *Carter's Case*, 221 Mass. 105, 108 N. E. 911; *Buckley's Case*, 218 Mass. 354, Ann. Cas. 1916B, 474, 105 N. E. 979; *Kenney's Case*, 222 Mass. 401, 111 N. E. 47; *Dazy v. Apponaug Co.*, 36 R. I. 81, 89 Atl. 160.)

That the phrase, "actually dependent upon the decedent at the time of the injury," in section 6 (n) of the Act in question, cannot be taken in its literal sense, is evident from the case of *Blanton v. Wheeler & Howes Co.*, 91 Conn. 226, Ann. Cas. 1918B, 747, 99 Atl. 494. In that case the supreme court of Connecticut in the course of its opinion uses the following language with reference to the words "in accordance with the fact as the fact may be at the time of the injury": "Dependency is to be determined in accordance with the fact as the fact may be at the time of the injury." (*Mahoney v. Gamble-Desmond Co.*, 90 Conn. 255, L. R. A. 1916E, 110, 96 Atl. 1025.)

That disability, which is synonymous with incapacity, means disability to perform work of the character in which the injured employee was engaged at the time of the accident, regardless of his earning capacity in other occupations, is established by the weight of authority. (See *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, Ann. Cas. 1916B, 330, 147 N. W. 53; *Gorrell v. Battelle*, 93 Kan. 370, 144 Pac. 244.) " 'Incapacity for work' means no more than

inability to earn wages or full wages, as the case may be, at the work in which the injured workman was employed at the time of the accident." (*Duprey's Case*, 219 Mass. 189, 106 N. E. 686; *In re Gillen*, 215 Mass. 96, L. R. A. 1916A, 371, 102 N. E. 346; *Burbage v. Lee*, 87 N. J. L. 36, 38, 93 Atl. 859.) A finding of total incapacity for work may be sustained although the claimant has been able to obtain some employment. (*In re Septimo*, 219 Mass. 430, 107 N. E. 63; *Hanley v. Union Stockyards Co.*, 100 Neb. 232, 158 N. W. 939; *Barron v. Blair*, 8 B. W. C. C. 501.) In *Ball v. Hunt*, 5 B. W. C. C. 459, Lord McNaughton said: "Now, 'incapacity for work,' as the phrase is used in the schedule, seems to me to be a compendious expression, meaning no more than inability to earn wages, or full wages, as the case may be, at the work in which the injured workman was employed at the time of the accident." (*McDonald v. Wilson's etc. Coal Co.* [1912], 5 B. W. C. C. 478; *Patterson v. A. G. Moore & Co.*, 47 Scot. L. Rep. 30, 31; *Moore v. Peet Bros. Mfg. Co.*, 99 Kan. 443, 162 Pac. 295.)

Turning our attention now to a judicial discussion of permanent invalidism predicated on an injury to the nervous system, we find that the courts, despite Wigmore's criticism that their "fact finding instruments are crude and unscientific," have discovered, judicially, the seriousness and permanency of nervous injuries, and in keeping with modern medical theory affirmed the proposition that "injury to the nervous system, and the mind, is always accompanied by physical affection or disability."

That total incapacity may result, as in this case, from a nervous or mental condition of such extent that it cannot be overcome is recognized and sustained by the best reasoned decisions and the text-writers generally. (Honnold's *Workmen's Compensation*, sec. 155, p. 602; *Yates v. South Kirby etc. Collieries, Ltd.* [1910], 3 B. W. C. C. 418.) "Nervous shock due to accident is as much personal injury due to accident as a broken leg." Pain alone may render a person unable to work, or partially unable to work. (*Trowbridge v. Wilson*

& Co., 102 Kan. 521, 170 Pac. 816; *Brown v. Watson, Ltd.* [1914], 7 B. W. C. C. 271.)

A pertinent feature of some of the foregoing decisions, as respects their application to claimant, is found in the fact that the neurasthenic condition existing in the individual, who made claim for compensation, had its beginning in an injury to the head, or a body fall of ten feet or more—just such an injury as Morgan received in the summer of 1900. Likewise, the results consequent on the injury manifested themselves in a condition similar to Morgan's—but by no means as severe or deep-seated.

True, the foregoing cases present a situation where the person claiming compensation and suffering from the neurasthenic malady was the person who was injured during his employment, but, on the particular question of incapacity, the cases are as applicable to an adult who claims dependency on the grounds of invalidism. That incapacity which would preclude a workman from labor and make him totally "disabled" or "incapacitated" operates as effectually to make another an "invalid" within the meaning of the Act, i. e., a person deprived of natural function and power.

Counsel for appellants, in their brief, refer to the decision of this court in the case of *Willis v. Pilot Butte Min. Co.*, 58 Mont. 26, 190 Pac. 124. In that case the appeal was from a judgment of the district court affirming the Compensation Board. In this case the appeal is from findings of the district court reversing the action of the board.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On July 12, 1916, one Edward Morgan, an employee of the defendant mining company, met death in an accident arising out of and in the course of his employment. All of the parties hereto are subject to the provisions of "plan two" of the Workmen's Compensation Act (Chap. 96, Laws 1915). Decedent had no wife, child, father or mother. P. F. Morgan, a brother forty-nine years of age, filed with the board, in the manner and within the time provided for by the Act, a claim

for compensation as a "minor dependent" on the ground that he was, at the time of the accidental death of his brother, an invalid dependent upon, and receiving support from, decedent. Numerous affidavits were filed in support of the claim, among them those of four physicians to the effect that claimant was in no condition to perform physical or mental labor.

The insurer contested the claim on the ground that, under the provisions of the Act, a brother of an injured employee was entitled to compensation only when under the age of sixteen years, and upon the further ground that claimant was not, at the time of the accident, nor a long time prior thereto, dependent upon the decedent, but, on the contrary, was an able-bodied man capable of earning his own living. A hearing was had and oral testimony introduced. Dr. Horst was the only physician called to the stand. The board commented at length upon, but did not decide, the question as to whether a brother over the age of sixteen years could, under any circumstances, be awarded compensation, but found that claimant was not an invalid within the meaning of the term as used in the Act, and rejected the claim.

An appeal was taken to the district court of Silver Bow county, and it was there stipulated that the matter should be heard and determined on the record as made before the board and the briefs of counsel. The district court in its findings declared that "the findings and conclusions of the board are not in accordance with either the facts or the law," set the action of the board aside, and awarded compensation. This appeal is from the judgment of the district court.

The first question which suggests itself to our minds, though not urged by counsel, is whether, under our Act, claimant is entitled to compensation no matter what his physical or mental condition was at the time of the accidental death of his brother.

Section 16 of the Act provides that: "Every employer and insurer who shall become bound by * * * plan Number two * * * shall be liable for the payment of compensation * * * to an employee who has elected to come under this Act and who shall receive an injury arising out of and in the course of his employment, or, in the case of his death from

such injury, to his beneficiaries, if any; or, if none, to his major dependents, if any; or, if none, to his minor dependents, if any." The terms here used are defined in section 6 of the Act:

"Sec. 6 (l). 'Beneficiary' means and shall include a surviving wife or husband * * * a surviving child or children under the age of sixteen years and an invalid child or invalid children over the age of sixteen years. * * *

"Sec. 6 (m). 'Major dependent' means if there be no beneficiaries, * * * the father and mother, * * * if actually dependent to any extent upon the decedent at the time of his injury.

"Sec. 6 (n). 'Minor dependent' means if there be no beneficiary, * * * and if there be no major dependent, * * * the brothers and sisters, if actually dependent upon the decedent at the time of his injury."

"Sec. 6 (o). 'Invalid' means one who is physically or mentally incapacitated."

Section 7 (a) then provides: "In computing compensation to children and to brothers and sisters, only those under sixteen years of age, or invalid children over the age of sixteen years, shall be included, and, in the case of invalid children, only during the period in which they are under that disability * * * after which payment on account of such person shall cease. Compensation to children, or brothers or sisters, * * * shall cease when such persons reach the age of sixteen years."

In the absence of the last clause quoted, the term "invalid" applies only to a child or children, and brothers and sisters over the age of sixteen years are clearly not entitled to compensation, no matter how absolute their dependency.

How far the use of the phrase "except invalids," in parenthesis after "children *or* brothers *or* sisters," in the final clause of section 7 (a), qualifies the former declaration, contained in the same section, that "in computing compensation * * * to brothers and sisters, only those *under* sixteen years of age, shall be included," it is not necessary for us to here determine, as the cause was by the board, and will here be, disposed

of on other grounds, properly presented and urged in the brief and argument of counsel.

The evidence is undisputed that at the time of the injury Edward Morgan was contributing approximately \$30 per month to the support of claimant. The only question before us, therefore, assuming that an invalid brother over the age of sixteen years is entitled to compensation, is: Was the finding of the board that claimant was not, at the time of the injury an invalid within the contemplation of the Act supported by any substantial evidence?

Counsel for claimant contend that, as the appeal is from the [1] judgment of the district court, the rule that "the supreme court will not reverse the findings of the district court except where the evidence clearly preponderates against them" controls, and that the findings and decision of the board are only indirectly involved. The reason for the adoption of the rule quoted is that in cases where such a rule is applicable the trial court has had the witnesses before it and had the superior advantage of considering their evidence in the light of their demeanor on the stand and the manner in which they testified. Where, however, the trial court renders its findings on the identical record presented to the appellate court, the reason for the rule does not attach; and it is one of our maxims that, "when the reason of a rule ceases so should the rule itself." (Sec. 6178, Rev. Codes.) We are in as an advantageous position as was the district court on the appeal from the findings [2] of the board. The rule contended for should, however, have governed the action of the district court; its position is analogous to that of a district judge, other than the one who presided at the trial, to whom a motion for a new trial has been submitted. In such a case this court has said: "When a motion for a new trial for insufficiency of the evidence is submitted to a judge other than the one who presided at the trial, for the very reason that he cannot call to his aid a recollection of the demeanor of the witnesses, he ought not to go further than to determine upon the dead record the question whether there is a decided preponderance of evidence against the verdict or decision. If such is the case, a new trial ought

to be granted; otherwise not." (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76, citing *Orr v. Haskell*, 2 Mont. 225, and *Landsman v. Thompson*, 9 Mont. 182, 22 Pac. 1148.)

This rule was applied in *Willis v. Pilot Butte Min. Co.*, 58 Mont. 26, 190 Pac. 124, which was also a case arising under our Compensation Act. In the opinion, after declaring that the action of the district court is that of review rather than a new trial, we said: "Our duty, then, is but to determine whether the evidence before the board clearly preponderates against its findings, as adopted by the court; if not, we must affirm the judgment." This is true whether the district court adopts or rejects the findings of the board on a review of the "dead record."

The rule almost universally adopted by the courts in jurisdictions having Compensation Acts is that the findings and decision of the commission or board cannot be reversed where there is any evidence to support them:

California: *Frankfort Ins. Co. v. Pillsbury*, 173 Cal. 56, 159 Pac. 150; *Western Indemnity Co. v. Pillsbury*, 172 Cal. 807, 159 Pac. 721; *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35; *Kirkpatrick v. Industrial Acc. Com.*, 31 Cal. App. 668, 161 Pac. 274; *Smith v. Industrial Acc. Com.*, 26 Cal. App. 560, 147 Pac. 600.

Michigan: *Bayne v. Riverside S. & C. Co.*, 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837; *Shafer v. Parke-Davis Co.*, 192 Mich. 577, 159 N. W. 304; *Papinaw v. Grand Trunk Ry. Co.*, 189 Mich. 441, 155 N. W. 545; *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125, L. R. A. 1916A, 17, 158 N. W. 657, 9 N. C. C. A. 647; *Ramlow v. Moon Lake Ice Co.*, 192 Mich. 505, L. R. A. 1916F, 955, 158 N. W. 1027; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243.

New York: *Rhyner v. Hueber Building Co.*, 171 App. Div. 56, 156 N. Y. Supp. 903; *Hendricks v. Seeman Bros.*, 170 App. Div. 133, 155 N. Y. Supp. 638; *Goldstein v. Centre Iron Works*, 167 App. Div. 526, 153 N. Y. Supp. 224; *Prokopiak v. Buffalo Gas Co.*, 176 App. Div. 128, 162 N. Y. Supp. 288.

Wisconsin: *Milwaukee Coke & Gas Co. v. Industrial Acc. Com.*, 160 Wis. 247, 151 N. W. 245; *First Nat. Bank v. Indus-*

trial Com., 161 Wis. 526, 154 N. W. 847; *Milwaukee v. Industrial Com.*, 160 Wis. 238, 151 N. W. 247; *Eagle Chemical Co. v. Nowak*, 161 Wis. 446, 154 N. W. 636; *Heileman Brewing Co. v. Shaw*, 161 Wis. 443, 154 N. W. 631.

Massachusetts: *In re Fierro's Case*, 223 Mass. 378, 111 N. E. 957; *In re Doherty's Case*, 222 Mass. 98, 109 N. E. 887; *In re Savage*, 222 Mass. 205, 110 N. E. 283; *In re Sanderson*, 224 Mass. 558, 113 N. E. 355; *In re Von Ette*, 223 Mass. 56, L. R. A. 1916D, 641, 111 N. E. 696.

Illinois: *Armour & Co. v. Industrial Board*, 273 Ill. 590, 113 N. E. 138; *Parker-Washington Co. v. Industrial Board*, 274 Ill. 498, 113 N. E. 976; *Chicago A. R. Co. v. Industrial Board*, 274 Ill. 336, 113 N. E. 629; *Sub. Ice Co. v. Industrial Board*, 274 Ill. 630, 113 N. E. 979; *Munn v. Industrial Board*, 274 Ill. 70, 113 N. E. 110.

New Jersey: *Blackford v. Green*, 87 N. J. L. 359, 94 Atl. 401; *Jackson v. Erie Ry. Co.*, 86 N. J. L. 550, 91 Atl. 1035; *Scott v. Payne Bros.*, 85 N. J. L. 446, 89 Atl. 927; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458.

Minnesota: *State ex rel. Crookston L. Co. v. District Court*, 132 Minn. 251, 156 N. W. 278; *State ex rel. Virginia & Rainy Lake Co. v. District Court*, 128 Minn. 43, 150 N. W. 211; *State ex rel. Nelson-Spelliscy Imp Co. v. District Court*, 128 Minn. 221, 150 N. W. 623.

Washington: *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

Rhode Island: *Weber v. American Silk Spinning Co.*, 38 R. I. 309, Ann. Cas. 1917E, 153, 95 Atl. 603, 11 N. C. C. A. 437.

Connecticut: *Appeal of Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245.

In the last case cited the court said: "Compensation Acts have had a common origin and a common history, and the great majority of the twenty-four thus far enacted in our states bear close resemblance to each other in essential features. In only three of the twenty-four, we believe, is a retrial of * * * fact permitted on appeal from an award; and, unless the Acts have expressly given a retrial, the courts have construed them to intend the contrary."

The authorities above cited merely apply to the findings and decision of the Accident Board, the general rule governing the review of the evidence on appeals generally. That this is true is indicated in *Re Savage, supra*, where it is said: "The findings of the Industrial Accident Board are equivalent to the verdict of a jury or the findings of a judge."

The rules heretofore announced in this jurisdiction that (1) the supreme court will not reverse the findings of the district court in equity cases, except where the evidence clearly preponderates against them, and (2) where there is a substantial conflict in the evidence, in an action at law, the supreme court will not reverse the judgment on the ground of insufficiency of the evidence, are but modifications of the general rule above announced.

We can therefore go no further than to determine from the cold record whether the evidence clearly preponderates against the findings of the board, and must assume that the district court found that it does.

The evidence is conflicting. While the claimant testified that [3] he was entirely incapacitated from performing any labor at the time of the accident and for more than three years prior thereto, it appears without contradiction that at the very time he was employed in a clerical position, receiving approximately \$4 per day for his services, and that he had been so employed for a period of six weeks prior to the accident. It is true that he established the fact that Edward Morgan was at the same time contributing to his support. But voluntary contributions are not necessarily evidence of dependency. (*Miller v. Riverside Storage Co.*, 189 Mich. 360, 155 N. W. 462.)

As proof of his dependency, claimant also offered proof to [4] the effect that he had been injured in a mine in the year 1900, and that as a result of that injury he was at the time of the injury to his brother unable to perform labor in the mines and suffered from constant headaches and nervousness. Yet it is admitted that he worked in the mines at Butte for seven years thereafter and on the police force of that city for two years, and did not leave the police force because of incapacity, but in order to attend a medical college. As to his

headaches and mental condition, Dr. Horst, called for the claimant, testified that he had examined the man and that he passed a pretty fair examination; that he found nothing much to warrant his condition; and that headache and nervousness would not, under ordinary conditions, incapacitate a man from work, although he added that, "if continued and persistent, he would land in the insane asylum or die, because one cannot suffer from these things all the time and not feel wretched." The board was not, however, concerned with problematical future conditions, but only with the condition of claimant at the time of the injury and for a reasonable period prior thereto.

It also developed that claimant was in the habit of taking as high as seventy-five Asetanilid tablets a day, for the relief of pain, which amount, the doctor testified, if taken by a man not accustomed to their use, would produce death. And it must be remembered that the board had the claimant himself before it on the stand; he was, in effect, a living exhibit of his then condition, which was said to be worse than at the time of the injury to his brother. The board in its findings commented on his condition, in the light of the evidence adduced, as follows: "On the witness-stand he proved a competent, careful witness, with a strong, quick, active, virile mind; not a moment's hesitancy in answering questions; quick on dates and positive in his statements, indicating that he could fairly and reasonably be expected to fill with satisfaction any clerical position. He was on the witness-stand for over an hour and a half, subjected to a thorough examination and a grueling cross-examination; yet there was not the slightest indication of exhaustion or undue nervousness, or any symptoms to indicate an invalid. He appeared strong physically, weighing close to 200 pounds (judging from appearance) and displayed exceptional mental ability."

It is contended that claimant's condition is due to an injury received in 1900, while working in another state, and counsel, taking that injury as the basis, contend that incapacity means only inability to perform the labor the injured party was performing at the time of the injury, and cite many cases under compensation laws in support of their contention. But these

cases refer, and can only refer, to disabled workmen seeking compensation for the injury resulting in disability, and can have no bearing on the incapacity of a dependent.

If a brother over the age of sixteen years is a "minor dependent" under the provisions of our Act, it can only be when [5] such brother is an "invalid"—that is, "one who is physically or mentally incapacitated." It is immaterial what is the cause of his infirmity; on the other hand, if he is able to support himself by his own effort in any branch of physical or mental endeavor, he cannot be said to be "incapacitated."

On the "dead record," we cannot say that the evidence clearly preponderates against the findings of the board, and are therefore forced to the conclusion that the district court erred in so finding.

The judgment and order appealed from are reversed, and the cause is remanded, with direction to the district court to enter judgment in accordance with the findings of the board.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLOWAY, HURLY and COOPER concur.

LOUDON ET AL., APPELLANTS, v. SCOTT ET AL., RESPONDENTS.

(No. 4,232.)

(Submitted November 19, 1920. Decided December 13, 1920.)

[194 Pac. 488.]

Physicians and Surgeons—Malpractice—Negligence—Gist of Action—Evidence—Insufficiency—Presumptions—Burden of Proof.

Trial—Nonsuit—Rule.

1. A case should never be withdrawn from the jury, unless it appears as a matter of law that a recovery cannot be had upon any view of the facts which the evidence reasonably tends to establish; but, whenever there is no evidence in support of plaintiff's case, or the evidence is so unsubstantial that the court would feel compelled to set aside a verdict, if one should be rendered for plaintiff, a nonsuit should be granted.

Degree of care and skill required of physicians and surgeons, see notes in 1 Ann. Cas. 306; 14 Ann. Cas. 605; 93 Am. St. Rep. 657.

Physicians and Surgeons—Malpractice—Gist of Action.

2. A physician is not an insurer, and a malpractice case does not differ in its essential ingredients from any other action for damages arising from negligence; the gist of the action being negligence, and actionable negligence arises only from a breach of legal duty.

Same—Extent of Duty Toward Patient.

3. A physician assumes toward his patient the obligation to exercise such reasonable care and skill as is usually exercised by physicians or surgeons of good standing of the same system or school of practice in the community in which he resides, having due regard to the condition of medical or surgical science at that time.

Same—Malpractice—When Expert Testimony Necessary.

4. *Held*, that expert medical testimony was necessary to determine the question whether a physician, in administering an anesthetic to his patient at a time when the latter showed the effects of drinking intoxicating liquor, was wanting in the exercise of ordinary care and skill which the law requires.

Same—Negligence—Evidence—Admission.

5. The statement of a physician that he knew it was dangerous to administer an anesthetic to an intoxicated patient, but because of his knowledge of patient's physical condition he felt justified in proceeding, was not an admission that the treatment did not conform to requirements of good surgery, nor indicated want of care, skill, ability or diligence.

Same—Negligence in Administering Anesthetic—Presumptions.

6. Since the evidence disclosed that the element of danger is present in every instance where a patient is anesthetized, negligence could not be presumed from the fact that it was dangerous to administer the anesthetic before he had entirely recovered from over-indulgence in strong drink or from the fact that he died shortly thereafter.

Same—*Res Ipsa Loquitur*—Inapplicability of Doctrine.

7. The doctrine of *res ipsa loquitur* has no application to a malpractice case.

Negligence—Presumptions.

8. Negligence is not to be presumed, but must be proven.

Physicians and Surgeons—Malpractice—Burden of Proof.

9. In an action for damages against a physician for negligently causing the death of a patient, plaintiff had the burden of proving negligence in the particular charged and that death resulted proximately from such negligence.

Same—Error of Judgment—Damages—Non-liability.

10. For an error of judgment by a physician of requisite learning, skill and ability, in the treatment of a patient, he cannot be held responsible in damages.

Same—Presumptions.

11. There is no presumption that a physician has authority to detain a patient in a hospital a sufficient length of time to enable him to recover from the effects of intoxication before undergoing an operation, any more than that he may operate upon him without his consent.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

ACTION by Olive Loudon and Rachael Loudon, a minor, by Olive Loudon, her guardian *ad litem*, against Drs. M. J. Scott and Frederick J. Langdon. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Mr. J. O. Davies, for Appellants, submitted a brief, and argued the cause orally.

The principles of law governing the conduct of a physician and surgeon and the care they must exercise in treating a patient are well established, and among those principles are the following: That the physician or surgeon, in treating a patient, must at least bring into use and use that degree of professional skill which he himself possesses; that is, in treating a patient, the physician or surgeon, if he knows a safe method of treating, he must use the safe method. He cannot ignore the safe method which he knows and adopt a method which he knows to be dangerous to the life of his patient. In other words, the physician or surgeon has no license under the law to knowingly take chances on the life of human beings and escape the charge of negligence any more than any other person. This principle of law is gone into very thoroughly and with great painstaking by Justice Jaggard, a distinguished jurist of Minnesota, in the case of *Staloch v. Holm*, 100 Minn. 276, 9 L. R. A. (n. s.) 712, 111 N. W. 264. He devotes several pages of the opinion for discussion of this question and repeatedly lays down the principles above mentioned. In the case of *Harris v. Fall*, 177 Fed. 79, 27 L. R. A. (n. s.) 1174, 100 C. C. A. 497, the court uses the following language: "In undertaking this professional work the obligation was incurred by Dr. Harris to exercise throughout the performance of his engagement both the ordinary care and skill of his profession in the light of modern advancement and learning on the subject and his own best ability, skill and care." This principle of law is so reasonable, sound and fundamental that we do not believe that it would be or could be disputed, even though no authorities whatever could be found to support it. It is only the application to physicians of the well-known principle of law laid down, we might say, in thousands of cases

which is to the effect that where there is a safe and dangerous way of performing an act or executing an undertaking, any person performing that act or executing the undertaking who knowingly adopts the dangerous way or method and brings injury upon himself or another, is charged as a matter of law with negligence, approximately causing such injury. (5 Thompson on Negligence, sec. 5372; 3 Labatt on Master and Servant, 2d ed., sec. 1219.) Keeping in mind this simple basic and fundamental principle of law, appellants contend that the record of this case establishes as complete a case of negligence against defendant Scott as has ever been established in any court.

Messrs. Walker & Walker and *Messrs. Kremer, Sanders & Kremer*, for Respondent, submitted a brief; *Mr. Thos. J. Walker* and *Mr. Alf. C. Kremer* argued the cause orally.

This is an action for malpractice, and in such actions there can be no recovery without expert medical testimony to show lack of requisite skill and care on the part of the defendant. (*Miller v. Toles*, 183 Mich. 252, L. R. A. 1915C, 595, 150 N. W. 118; *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870; *Ewing v. Goode*, 78 Fed. 442; *Ball v. Skinner*, 134 Iowa, 298, 111 N. W. 1022; *Zoterell v. Repp*, 187 Mich. 319, 153 N. W. 692; *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807; *Wilkins' Admr. v. Brack*, 81 Vt. 332, 70 Atl. 572.)

To establish negligence against the defendant Scott it was necessary that the plaintiff prove that he failed to exercise such reasonable skill and attention in the treatment afforded deceased as that employed in this and similar localities by physicians and surgeons exercising reasonable care and skill. "A physician is not chargeable with negligence for failure to use his best skill and ability if he uses the care and skill which are exercised generally by physicians of ordinary care and skill in similar communities." (*Dorris v. Warford*, 124 Ky. 768, 14 Ann. Cas. 602, 9 L. R. A. (n. s.) 1090, 100 S. W. 312.) This is the basic law in all cases of malpractice. (*Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561, 3 Det. L. N. 198; *Carpenter v. Blake*, 10 Hun (N. Y.), 358, 359; *Whitesell*

v. *Hill*, 101 Iowa, 629, 37 L. R. A. 830, 70 N. W. 750; *Force v. Gregory*, 63 Conn. 167, 38 Am. St. Rep. 371, 22 L. R. A. 343, 27 Atl. 1116; *Hathorn v. Richmond*, 48 Vt. 557; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674; *Nelson v. Harrington*, 72 Wis. 591, 7 Am. St. Rep. 900, 1 L. R. A. 719, 40 N. W. 228.)

There is the statement of Dr. Scott to the effect that had he confined the deceased to the hospital and prevented him from obtaining alcoholic stimulants, and had he not attempted to operate at the time he did, the deceased would have had a greater chance for recovery. But this is not evidence of negligence. The fact that the deceased was not detained in the hospital for such a length of time as to eliminate all traces of alcohol can only be construed as an error in judgment upon the part of Dr. Scott, and for such an error in judgment an action for malpractice will not lie. (*Spain v. Burch*, 169 Mo. App. 94, 154 S. W. 172; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Becker v. Janinski*, 27 Abb. N. C. (N. Y.) 45, 15 N. Y. Supp. 675.)

“While the responsibility of the medical practitioner and surgeon is great and care appropriate should be observed in the exercise of his professional employment when his errors are those of judgment only, if he keeps within recognized and approved methods, he is not liable for their consequences.” (*Wells v. World's Dispensary Medical Assn.*, 45 Hun, 588, 9 N. Y. St. Rep. 452; *Dorris v. Warford*, 124 Ky. 768, 14 Ann. Cas. 602, 9 L. R. A. (n. s.) 1090, 100 S. W. 312; *Nickerson v. Gerrish*, 114 Me. 354, 96 Atl. 235; *Fisher v. Niccolls*, 2 Ill. App. 484.)

“One of two physicians separately employed who undertakes to administer the anesthetic while the other performs an operation is not liable for the other's negligence and malpractice in doing the work if he has no actual knowledge of it.” (*Morey v. Thybo*, 199 Fed. 760, 118 C. C. A. 198, note in 42 L. R. A. (n. s.) 483, and cases cited; *Stokes v. Long*, 52 Mont. 470, 482, 159 Pac. 28; *Reynolds v. Smith*, 148 Iowa, 264, 127 N. W. 192; *Myers v. Holborn*, 58 N. J. L. 193, 55 Am. St. Rep. 606, 30 L. R. A. 345, 33 Atl. 389.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 18, 1914, Dr. M. J. Scott caused an anesthetic to be administered to Charles Loudon, preparatory to performing a surgical operation. Loudon died from the effects of the anesthetic before the operation was commenced, and this action was thereafter instituted to recover damages for malpractice. Issues were joined and the cause was brought to trial. At the close of plaintiffs' case the court granted a nonsuit, and ordered judgment dismissing the complaint. From that judgment, and from an order denying a new trial, plaintiffs appealed.

The surgeon is charged with negligence (1) in causing the anesthetic to be administered at the particular time, when the patient was in an unfit physical condition, and (2) in the manner in which it was administered; but there was not any attempt made to prove the second charge, and we may presume that it was abandoned.

Mrs. Loudon testified that a few days after Loudon's death she went to Dr. Scott to procure a certificate of death to be used by her in the settlement of some insurance claim, and that Dr. Scott then told her that death was not caused by the injury which Loudon had received on June 4, but was produced by the shock of the anesthetic administered while Loudon was "in an intoxicated condition and suffering from acute alcoholism"; that she asked him why he gave Loudon the anesthetic while he was in that condition, and he replied that he knew it was dangerous, but that Loudon was a strong, healthy man, and he thought he could stand it. Mrs. Loudon also testified: "My husband was a strong, healthy man, being five feet eleven inches tall, and weighed about 175 pounds; his normal weight being about 200, 210, or 214, something like that. * * * I don't know anything about Mr. Loudon drinking for the last three weeks before his death; I never saw him drunk. * * * Prior to the time Mr. Loudon received this injury, he was a sober man, and worked daytime; worked steadily; didn't lose any time." A witness, Connors, testified

he was with Loudon on the afternoon of July 17; that Loudon was then "under the influence of liquor." This was immediately before Loudon went to the hospital.

In addition to the foregoing, there was introduced, on behalf of the plaintiffs, the testimony which Dr. Scott had given upon the trial of two other cases, which testimony may be summarized briefly as follows: On June 4, 1914, Charles Loudon was taken to St. James Hospital suffering from a comminuted fracture of both bones of the right forearm, sustained while working in one of the mines in Butte. Dr. Scott took charge of the case, applied temporary bandages and dressings, and later had an X-ray picture taken, and determined that a surgical operation would be necessary as soon as the swelling in the arm receded and the soreness disappeared sufficiently to admit of it, which would require from three to four weeks. Loudon returned to the hospital frequently to have the dressing changed, and at the expiration of about four weeks Dr. Scott observed that he was indulging in intoxicating liquors to excess and admonished him to desist, which he promised to do, but did not do. An appointment was made for a definite time for the operation, but when the time arrived Loudon presented himself in an intoxicated condition, and was sent home with the warning that he must desist from the use of intoxicants in order that the operation might be performed and his arm saved from uselessness. Another appointment was made, but again Loudon appeared at the hospital intoxicated, and again he was sent home with the like admonition. Whether he was sent home a third time is not made certain. During the two or three weeks which intervened after Dr. Scott discovered that he was drinking to excess, Loudon had suffered from acute alcoholism, and did not stop the use of intoxicants until the afternoon of July 17, when he appeared at the hospital "more sober than he had been, but he showed the effects of drinking," and, accepting the advice of Dr. Scott, stayed there overnight during which time the doctor got him in as good condition as he could under the circumstances. The operation had been delayed then two or three weeks, solely on account of Loudon's intemperance.

On the morning of July 18, Dr. Langdon and Dr. Murphy prepared the patient for Dr. Scott to operate upon, and to that end administered to him an anesthetic. The doctors discovered presently that Loudon was not progressing favorably, and they undertook to restore him, but without avail. He had convulsions, with some of the characteristics of an alcoholic fit, and died within twenty minutes.

The operation which Dr. Scott was about to perform was necessary to prevent the arm becoming useless, and, in order to perform it, it was necessary that the patient be given an anesthetic. The effect of Loudon's drinking was to weaken his heart action, lower his vitality, and make it much more dangerous to administer the anesthetic to him. The cause of death was "the shock from the anesthetic, plus his condition." If he had refrained from the use of intoxicants to excess, his chances of recovery would have been better, but he still would have had to take one chance in from 2,000 to 5,000 as everyone does who takes an anesthetic. Dr. Scott also testified: "I had sole charge of Mr. Loudon. A doctor knows when it is safe to put a man on the operating-table."

This is substantially an epitome of the evidence so far as it reflects upon the question of negligence.

Counsel for appellants in his brief makes the statement that Dr. Scott also testified that he could have placed Loudon in the hospital at any time he desired and removed the condition which caused his death. By this we presume that counsel contends that Dr. Scott testified that he could have kept Loudon in the hospital a sufficient length of time to remove the effects of his intemperance sufficiently to make the administration of the anesthetic a safer operation. But the record, which is cited by counsel, does not justify the statement. It discloses that a question was propounded to Dr. Scott, evidently intended to elicit information of that character; that an objection was interposed and sustained, and this question was then asked and answered: "Q. Why didn't you keep him in the hospital and take charge of the case until such time as the conditions were favorable for operating on him? A. We did have him in one time, and he wanted to go home, and there

was no objection in his condition to his going home; there was nothing in his condition, in his injury or his condition, that would prevent his going home; he wanted to go home. As to his condition of intoxication when he came to the hospital, he was not what would be called paralyzed drunk. He had been drinking sufficiently that his breath showed very badly that he had been drinking; his face showed it; his face continued flush; and his talk showed it. He was a little bit unsteady, but not so that he couldn't walk. One could remove most of that condition probably in twenty-four hours."

Whether this statement relates to Loudon's visit to the hospital on July 17, to some prior visit, or to his visits generally during the last two or three weeks of his life, is left to conjecture.

It is the rule in this jurisdiction that a case should never [1] be withdrawn from the jury unless it appears as a matter of law that a recovery cannot be had upon any view of the facts which the evidence reasonably tends to establish (*Stewart v. Stone & Webster Eng. Corp.*, 44 Mont. 160, 119 Pac. 568); but whenever there is not any evidence in support of plaintiff's case, or the evidence is so unsubstantial that the court would feel compelled to set aside a verdict, if one should be returned for plaintiff, a nonsuit should be granted. (*Escallier v. Great Northern Ry. Co.*, 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458.)

Does this evidence, viewed in the light most favorable to plaintiffs, reasonably tend to establish the negligence charged against Dr. Scott?

The consensual transaction from which arises the relation of physician and patient does not imply absolute liability. [2] A physician is not an insurer, and a malpractice case does not differ in its essential ingredients from any other action for damages arising from negligence. The law does not presuppose that for every injury there must be a recovery in damages. The gist of this action is negligence, and actionable negligence arises only from a breach of legal duty. (*Jonosky v. Northern Pac. Ry. Co.*, 57 Mont. 63, 187 Pac. 1014.)

What, then, was the legal duty which Dr. Scott owed to [3] Charles Loudon? In *Hansen v. Pock*, 57 Mont. 51, 187 Pac. 282, this court said: "It is the rule, recognized by the courts generally, that when one holds himself out as a physician or surgeon, whether licensed or not, and accepts employment as such to treat a patient, he assumes toward the patient the obligation to exercise such reasonable care and skill in that behalf as is usually exercised by physicians or surgeons of good standing, of the same system or school of practice in the community in which he resides, having due regard to the condition of medical or surgical science at that time."

The same rule is expressed in somewhat different terms by the supreme court of New York, in *MacKenzie v. Carman*, 103 App. Div. 246, 92 N. Y. Supp. 1063, as follows: "The law thus requires a surgeon to possess the skill and learning which is possessed by the average member of the medical profession in good standing, and to apply that skill and learning with ordinary and reasonable care. He is not liable for a mere error of judgment, provided he does what he thinks is best after a careful examination. He does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care, and to exert his best judgment in the effort to bring about a good result." That language is quoted approvingly in *Stalock v. Holm*, 100 Minn. 276, 9 L. R. A. (n. s.) 712, 111 N. W. 264, and in *McAlinden v. St. Marie's Hospital Assn.*, 28 Idaho, 657, Ann. Cas. 1918A, 380, 156 Pac. 115. To the same effect is the text in 21 R. C. L. 381, and 30 Cyc. 1570. (See, also, *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 769.)

Isolated cases may be found in which loose language is employed to the effect that the physician owes to the patient the duty to exercise his best care, skill and ability; but the doctrine is as illogical as the practical application of the rule would be ridiculous. As said by the Kentucky court of appeals in *Dorris v. Warford*, 124 Ky. 768, 14 Ann. Cas. 602, 9 L. R. A. (n. s.) 1090, 100 S. W. 312. "No man is always at his best. One who employs a professional man may expect

from him the ordinary care and skill of his profession. He is liable if he does not give this, but more cannot be demanded. If the physician is responsible in any case where he does not exercise his best skill and ability, then it will be a material inquiry, and evidence may be offered to show what is his best skill and ability. This would be to introduce into the case a new and confusing issue, which has never been allowed. When a person employs a physician, the law implies an agreement on his part to exercise the ordinary care and skill of the profession. The implied contract goes no further, and there is no liability on his part if the implied contract has not been broken. Were it otherwise, there would be no fixed rule in cases of this sort, and in every case the result would depend, not on the contract implied by law between the parties, but on the proof in that case as to the skill and ability of the physician. It is no defense to the physician that he used his best skill and ability if he fell short of the legal standard, and there is no liability on his part if his care and skill come up to the legal standard."

The object of the law on the one hand is to guard the patient against the wrongful practice of ignorant or negligent men who hold themselves out as physicians or surgeons, and on the other to protect the faithful practitioner of ordinary learning, skill and ability from loss in reputation or purse on account of matters for which it would be unreasonable to hold him responsible. (*Heath v. Glisan*, 3 Or. 64.)

Having determined the standard of legal duty, there remains but the inquiry: In what respect, if at all, did Dr. Scott fail to measure up to that standard? What did he do or fail to do that was not consonant with good practice or approved surgery? There is not even a suggestion in the evidence that he did not possess that reasonable degree of learning and skill which was ordinarily possessed by the members of his profession in good standing in the locality where he practiced; but it is contended that he did not use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose of his employment.

There is not any controversy in the evidence which tends to prove the condition of the patient prior to his injury on June 4, the character and extent of his injury, the method of treatment adopted, the instructions given to the patient, the conduct and condition of the patient during the six weeks preceding July 18 and on that date, and the result which [4] followed the administration of the anesthetic; but there was not any expert testimony to the effect that, upon these admitted facts, the action of Dr. Scott in causing the anesthetic to be administered to Loudon on July 18 indicated the exercise or want of ordinary care, skill or diligence, as is required in malpractice cases in this jurisdiction and elsewhere generally. (*Stevenson v. Gelsthorpe*, 10 Mont. 563, 27 Pac. 404; *Schumacher v. Murray Hospital*, ante, p. 447, 193 Pac. 397; 1 Witthaus & Becker on Medical Jurisprudence, 87.)

But it is the contention of appellants that they met the [5] requirements of the rule fully by introducing the admissions made by Dr. Scott, to the effect that he knew that Loudon's intemperance had reduced his vitality and greatly increased the danger incident to the administration of an anesthetic, and that he knew it was dangerous to cause the anesthetic to be administered to Loudon on July 18, but because of his knowledge of the patient's physical condition he felt justified in proceeding at that time. That this does not amount to an opinion or admission that the treatment—the administration of the anesthetic under the circumstances—was not in conformity to the requirements of good surgery, or indicated a want of ordinary care, skill, ability or diligence, [6] is so obvious as to require no comment. No presumption of negligence arises from the fact that it was dangerous to administer the anesthetic to Loudon on July 18, for the evidence discloses that the element of danger is present in every instance where a patient is anesthetized.

The gravamen of this case is negligence, and negligence cannot be inferred from the fact alone that the patient died. (*Haire v. Reese*, 7 Phila. (Pa.) 138; *Bonnet v. Foote*, 47 Colo. [7-9] 282, 28 L. R. A. (n. s.) 136, 107 Pac. 252.) The maxim,

“*Res ipsa loquitur*,” has no application to a case of this character. (*Ewing v. Goode* (C. C.), 78 Fed. 442.) Negligence is not to be presumed; it must be proved (*Reino v. Montana M. L. Co.*, 38 Mont. 291, 99 Pac. 853), and plaintiffs were required to assume the burden of proving the negligence charged and that Loudon’s death resulted proximately from such negligence (3 Wharton’s & Stille’s Medical Jurisprudence, sec. 500). From the very nature of the case, each of these ultimate facts required for its proof the testimony of one qualified to give an expert opinion (*Pettigrew v. Lewis*, 46 Kan. 78, 26 Pac. 452), and in the absence of such testimony the case failed.

It is not difficult to understand why expert testimony was [10] not introduced. The subject matter does not admit of it. The case made is one wherein the question whether the operation should have been undertaken on July 18 was addressed exclusively to the sound judgment of the surgeon in charge. In the absence of evidence to the contrary, we must assume that Dr. Scott possessed the requisite learning, skill and ability. There is no charge made that he was remiss in failing to collect all the data essential to an intelligent judgment. On the contrary, it appears that he knew the patient’s history during the preceding six weeks at least; that he knew that Loudon was a strong, robust man of middle age; that he knew the fact, extent and effect of Loudon’s intemperance, and for what length of time he had refrained from the use of alcoholic intoxicants; that he knew the character and extent of Loudon’s injury, and the effect which it had upon his system; and with all this knowledge, available to draw upon, he determined that the patient could withstand the shock of the anesthetic on the morning of July 18. There is nothing in the record to suggest an impeachment of his good faith; on the contrary, the evidence leads to but one conclusion: That Dr. Scott exercised a *bona fide* judgment, and if, under the circumstances, an error was committed—and the evidence does not warrant such an assumption—it was merely an error of judgment for which he cannot be held respon-

sible in damages. (*Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147.) Upon a somewhat similar state of facts the same conclusion was reached in *Staloch v. Holm*, above, and in *Wood v. Wyeth*, 106 App. Div. 21, 94 N. Y. Supp. 360.

It is suggested in the brief of counsel for appellants that [11] Dr. Scott could have detained Loudon in the hospital a sufficient length of time to remove the effects of his intemperance, and that there was not present any emergency which compelled the operation at the particular time it was undertaken. There is not any evidence to justify either assertion, and certainly there is not any presumption that a physician has authority to detain his patient against the patient's will, any more than that he may operate upon the patient without patient's consent. Whether the operation could have been performed as well at a later date is left to conjecture. If the operation had been postponed longer, and serious results had followed to Loudon's arm, Dr. Scott might have been called upon to respond in damages for his negligence in failing to operate at the proper time.

The evidence is not sufficient to carry the case to the jury, and the trial court properly so ruled.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HURLY, MATTHEWS and COOPER concur.

STATE, RESPONDENT, v. FRANCIS, APPELLANT.

(No. 4,474.)

(Submitted November 22, 1920. Decided December 13, 1920.)

[194 Pac. 304.]

*Criminal Law — Grand Larceny — Circumstantial Evidence —
Instructions—Practice—Nunc Pro Tunc Orders—Invalidity
—Fugitive from Justice.*

Criminal Law—Practice—Nunc Pro Tunc Order—Definition.

1. A valid *nunc pro tunc* order is one which should have been made at an earlier date and which, therefore, courts may cause to take effect as of the date when it should have been made.

Same—Motion for New Trial—Nunc Pro Tunc Order—Invalidity—Fugitive from Justice.

2. Where defendant, after being found guilty of crime, became a fugitive from justice, a *nunc pro tunc* order made on surrendering himself some sixteen months later, and long after the time for perfecting his motion for new trial had expired, extending the time for filing his bill of exceptions and affidavits, held of no effect and that the motion for new trial was properly denied.

Same—Appeal—Record—Errors Reviewable.

3. Under section 9416, Revised Codes, defendant, on appeal from the judgment of conviction, may, by bill of exceptions, bring before the court errors in the decision of questions of law arising during the course of the trial; exclusive of those embraced within the provisions of the statute providing for new trials.

Same—Instructions—Preponderance of Evidence—Error.

4. An instruction on "preponderance of the evidence" has no place in a criminal trial, the defendant being required to do no more in the way of evidence in his behalf than introduce sufficient to raise a reasonable doubt of his guilt.

Same—Instructions—Circumstantial Evidence—To be Viewed as a Whole.

5. An instruction offered by defendant on the law of circumstantial evidence to the effect that if there was any single fact proved to the satisfaction of the jury inconsistent with his guilt, acquittal should follow, was correctly refused, since the jury must draw its conclusion from the circumstances relied upon for conviction as a whole, and if then they are inconsistent with any rational hypothesis other than his guilt, a verdict of guilty may follow.

Same—Failure of Defendant to Offer Proper Instruction—Effect.

6. Under section 9271, Revised Codes, it was the duty of defendant to offer a correct instruction on the law of circumstantial evidence, failing in which he was in no position to complain of omission to instruct the jury on that point.

Escape of person convicted of crime as affecting his proceedings for review, see notes in 3 Ann. Cas. 512; 13 Ann. Cas. 497.

Instructions on issue of circumstantial evidence in criminal cases, see note in 97 Am. St. Rep. 789.

Necessity that circumstantial evidence, to convict of crime, must exclude every reasonable hypothesis except guilt of defendant, see note in Ann. Cas. 1913E, 428.

Same—Circumstantial Evidence—When Instruction Required—Theory of Case.

7. The necessity for an instruction on circumstantial evidence arises only in cases depending entirely on such evidence; hence where counsel for defendant conceded on the trial that it was not the theory of the defense that the case depended upon circumstantial evidence alone, refusal of an instruction was not error.

Same—Destruction of Evidence by Defendant—Evidence—Admissibility.

8. Testimony tending to show destruction or suppression of evidence by defendant, though incidentally having reference to a separate offense, may be shown as a circumstance tending toward his guilt.

Same—Failure to Offer Instruction—Presumptions.

9. Defendant, not having offered an instruction as to the purpose for which the testimony last above mentioned was received, must be presumed to have been satisfied that none was necessary, and was therefor in no position to complain of failure to instruct thereon.

Appeal from District Court, Hill County; W. B. Rhoades, Judge.

GEORGE FRANCIS was convicted of grand larceny and appeals from the judgment. Affirmed.

Mr. O. W. McConnell and *Mr. J. P. Donnelly*, for Appellant, submitted a brief; *Mr. McConnell* argued the cause orally.

This is a case where the state relied absolutely upon circumstantial evidence. The eye of no witness saw the taking nor did human lip testify to any actual taking. Nor were the facts and circumstances testified to in such juxtaposition to the main fact, in this case, to the fact of the taking, so as to take the case outside of the rule of circumstantial evidence. (*Alderman v. State* (Tex. Cr.), 23 S. W. 685; *Guerrero v. State*, 46 Tex. Cr. 445, 80 S. W. 1001.) It was the duty of the court in this case to instruct on circumstantial evidence.

It is especially true that the jury in this case should have been so instructed because on their examination on their *voir dire* it is disclosed that eleven of them had never before sat upon a jury in a criminal case. No such instruction was given. Even if the defendant had not asked for such an instruction, the court, of its own motion, should have given the instruction relating to circumstantial evidence. (Underhill on Criminal Evidence, sec. 6; Wharton's Criminal Evidence, 19th ed., sec. 876; *Hamilton v. State*, 96 Ga. 301, 22 S. E. 528;

Bowen v. State, 140 Ala. 65, 37 South. 233; *People v. Dick*, 32 Cal. 213; *State v. Calder*, 23 Mont. 504, 59 Pac. 903; *State v. McKnight*, 21 N. M. 14, 153 Pac. 76; *Colbert v. State*, 125 Wis. 423, 104 N. W. 61; *State v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *Wantland v. State*, 145 Ind. 38, 43 N. E. 931.)

The information in this case charges the defendant with the larceny of a bay mare on the first day of March, 1915. Upon this information the defendant was arraigned, entered his plea of not guilty and proceeded to trial. Evidence was introduced on behalf of the state relative to the larceny of the bay mare on March 1, 1915. But after the state had rested its case and the evidence of the defendant had been introduced, the state was permitted to introduce proof of another larceny said to have been committed on the fourth day of November, 1917, of the same bay mare. This testimony was introduced in rebuttal by the state over the objection of the defendant. The court permitted testimony of two separate and distinct takings of the same animal—the testimony of the second taking entirely rebuttal testimony and no part of the state's case in chief.

This court has laid down the rule that the information can charge but one offense, and that the defendant can be convicted only of the offense charged. The state cannot prove two or more offenses as such and then select any one of them as the one for which conviction will be sought. The purpose of this is to separate the evidence of the crime charged from that which is merely corroborative by identifying the act which was from the beginning intended to be charged, and to destroy the possibility of conviction of any other. It necessarily precludes the notion that a conviction can be had for any act other than the one intended from the beginning to be charged. "It follows, too, that when the information fixes a day, and the evidence shows an act of the character charged as a crime at that time, the state cannot be allowed to claim a conviction under that information for a similar act at some other time." (*State v. Gaimos*, 53 Mont. 118, 124, 162 Pac. 596.)

Mr. S. C. Ford, Attorney General, and *Mr. A. A. Grorud*, Assistant Attorney General, for the state, submitted a brief; *Mr. Grorud* argued the cause orally.

The court was clearly right in refusing the instruction on circumstantial evidence, for the reason that but a very small part of the evidence in this case, if any, was circumstantial. The fact that the mare was feloniously taken from the possession of Clack is clearly established by the testimony of Avery and other witnesses; that the fact that the animal came unlawfully into the possession of the defendant is also clearly established by the evidence in the case; and that the facts connecting the defendant in this action with the larceny were clearly shown by the statements of the defendant himself. (*People v. Burns*, 121 Cal. 529, 53 Pac. 1096; *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586.) Although no witness testifies to the actual taking, yet the criminative circumstances may be in such "juxtaposition to the main fact" as to be equivalent to direct testimony. Under such circumstances the case is not wholly dependent upon circumstantial evidence, and hence there is no necessity of a charge thereon. (*Bennett v. State*, 32 Tex. Cr. 216, 22 S. W. 684; *Scott v. State* (Tex. Cr.) 23 S. W. 685.)

The defendant argues that evidence of two separate offenses was permitted to go to the jury, and bases his contention on the fact that the information which the defendant was tried under charged the defendant with larceny of a bay mare on the first day of March, 1915, and the trial court permitted the state to introduce proof of another larceny of the same bay mare which was committed on the fourth day of November, 1917. The testimony in regard to the larceny which took place on November 4, 1917, was introduced in rebuttal to refute the testimony of the defendant, no objection being made to its introduction. Where evidence is clearly rebuttal, the one offering it is entitled to have it admitted, and its exclusion is error (*Anaconda Copper Min. Co. v. Heinze*, 27 Mont. 161, 69 Pac. 909; *Glenn v. Stewart*, 167 Mo. 584, 67 S. W. 237), even though the rebutting testimony would not

have been admissible on direct examination. (*Ankersmit v. Tuch*, 114 N. Y. 51, 20 N. E. 819.)

MR. JUSTICE MATTHEWS delivered the opinion of the court.

On February 28, 1918, George Francis was found guilty of the crime of grand larceny. The trial court thereupon set March 4, at the hour of 9:30 A. M., as the time for pronouncement of judgment on the verdict, permitting the defendant to remain at large under his bail of \$2,000 theretofore given. On March 1, 1918, through his attorneys, defendant served and filed notice of motion for a new trial. At the time appointed the court convened and continued the matter of pronouncement of judgment until March 6, 1918, and allowed the defendant thirty days' additional time "for filing bill of exceptions and filing notice of motion for a new trial." The court thereupon required the defendant to furnish an additional bail bond in the sum of \$5,000 before 3 P. M. of the same day, at which hour, the bond not having been filed, the court issued a bench warrant for the defendant. It was then discovered that the defendant could not be found. On March 6 the court made a minute entry to the effect that the defendant was called and failed to appear and his bail in the sum of \$2,000 is therefore forfeited.

No further proceedings were had in the case until July 8, 1919, when the court made and filed the following order:

"Whereas, the defendant, George Francis, has failed to come into court for pronouncement of judgment upon the verdict of the jury rendered in this case, and has failed to render himself in execution thereof, the defendant's bail in the sum of \$2,000 has been ordered forfeited.

"It is ordered that the official reporter of this court be and he is hereby directed not to furnish a transcript of the evidence in this case to any one, and all further proceedings in this case are stayed until the defendant renders himself in execution of judgment,

"The time for the filing of a bill of exceptions and affidavits on motion for a new trial is hereby extended for ten

days after rendition of judgment in this case. This order shall take effect *nunc pro tunc* as of March 6th, 1918."

"Filed July 8, 1919.

"W. B. RHOADES, Judge."

On the same day the defendant surrendered himself to custody, and the court pronounced judgment sentencing him to from six to twelve years in the state penitentiary.

On July 17, pursuant to the *nunc pro tunc* order, defendant's draft of a bill of exceptions was served and numerous affidavits in support of the motion for a new trial were filed. No new notice of motion was filed, the defendant relying on his notice of March 1, 1918. The bill of exceptions was later, over the objection of the state, settled and allowed, and the motion submitted and denied. The appeal is from the judgment and from the court's order denying defendant's motion for a new trial.

1. The defendant's right to move for a new trial is dependent [1,2] upon the validity of the *nunc pro tunc* order, for, in its absence, the time in which defendant could perfect such a motion had long since expired.

"*Nunc pro tunc*" means, literally, "now for then," and a valid *nunc pro tunc* order is one which, for some good reason, should have been made at an earlier date, and which, therefore, the court may cause to take effect as of the date when it should have been made. The circumstances under which this may be done in this jurisdiction are concisely stated in *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106, as follows: "The court may, in all proper cases, enter orders and judgments *nunc pro tunc*. * * * The cases in which the court will do this are of two classes: The first consists of those in which one of the parties dies after the verdict has been rendered, or the cause submitted for decision, and it is necessary to enter the judgment as of the date of the submission of the cause, to prevent injustice. * * * The second class is composed of those cases where an order or judgment has actually been made or rendered by the court, but, by reason of some

misprision for which the parties are not entirely to blame, has never been entered."

In the case of *Security Trust & Savings Bank v. Reser*, ante, p. 501, 193 Pac. 532, this court held that where a judgment should have been entered at a date certain, and the court failed to do so, a *nunc pro tunc* judgment should be entered as of such date, for the failure was not imputable to negligence on the part of the plaintiff.

It has been repeatedly held that, where it appears on appeal that the defendant is a fugitive from justice, the appeal will be dismissed. (3 Ann. Cas. 512, note.) The reason assigned generally for such action is that, by voluntarily failing to appear and assert his rights under the Constitution, the defendant is deemed to have waived those rights. (*Commonwealth v. Andrews*, 97 Mass. 543.) This court has, however, declared on the subject as follows: "The prevailing rule seems to be, however, not to make the order of dismissal final until the defendant has had an opportunity to surrender himself to the proper custody and submit to the jurisdiction of the court. We adopt this as the better rule." (*State v. Dempsey*, 26 Mont. 504, 68 Pac. 1114.) In the case of *People v. Genet*, 59 N. Y. 80, 17 Am. Rep. 315, cited in the *Dempsey Case*, the court held, in refusing a writ of mandate to compel the settlement of a bill of exceptions, that "When a person charged with felony has escaped out of custody, * * * the courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of" such person.

It would seem, then, that, had counsel for defendant sought to have a bill of exceptions on motion for a new trial settled and to file affidavits in support of the motion, the court would have been justified in refusing to proceed; in fact, it would have been the court's duty to so dispose of the application and to strike from the files the affidavits. However, by analogy with the rule laid down in the *Dempsey Case*, the court might, while the matter was thus before it, have made such an order as that of July 8, on condition that the defendant should, within a reasonable time fixed in the order, return to the

jurisdiction and surrender himself to custody, as was done in that case. But nowhere in the order of July 8 does it appear that such an order was made on March 6, 1918, or that the so-called *nunc pro tunc* order was to take the place of an order which should have been entered in the minutes of that date. In fact, the minute entries negative any such idea. In the absence of any steps taken by counsel, the court should presume that, the defendant having fled the jurisdiction of the court, he and his counsel had abandoned his motion for a new trial.

The situation in which the defendant found himself on July 8, 1919, was brought about solely by his own wrongful, voluntary and contemptuous act in defying the authority of the court; it cannot by any stretch of the imagination be said to have resulted from any dereliction on the part of the court, nor can it be said that relief was then necessary to prevent injustice being done. To allow the defendant at that late date to evade the consequences of his own wrongful act would be tantamount to permitting him to take advantage of his own wrong in violation of section 6185 of the Revised Codes.

Even if we were to resort to the fiction that the order was made on March 6, 1918, but "by reason of some misprision" did not appear in the minutes of that date, the court would stultify itself by the tacit holding that sixteen months was a reasonable time in which the defendant might purge himself of contempt by returning.

It is therefore clear that no error was committed in denying the motion for a new trial, as there was no proper motion before the court.

2. However, the bill of exceptions was before the court for such purposes as it may be used on an appeal from the judgment, for section 9340, Revised Codes, provides for the presentation of a draft of a bill of exceptions, on two days' notice to the county attorney, within ten days after *judgment*, and this provision was complied with.

Section 9416 provides that "Upon an appeal taken by the [3] defendant from a judgment, the court may review any

intermediate order or ruling involving the merits, or which may have affected the judgment.”

This section is carried forward from the Annotated Codes of 1895, where it bore the number 2321, which section was interpreted, in *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399, to permit the defendant to bring before the court on an appeal from the judgment alone, by bill of exceptions, errors in the decision of questions of law arising during the course of the trial, exclusive of those errors which “are embraced within any of the provisions of the law made for granting new trials.” Applying the rule thus laid down, we have presented for our consideration the following specifications of error:

(a) The court erred in refusing to instruct on the law of circumstantial evidence.

(b) It was error on the part of the court to admit evidence of two separate and distinct offenses.

(c) The court erred in not instructing the jury as to the purpose for which evidence of another offense than that charged in the information was permitted to be introduced.

Taking these up in the order stated:

(a) The defendant requested the court to give the following instruction:

“III A. The jury are instructed that, in cases of circumstantial evidence, the case before you being of that character, the jury must not only be satisfied beyond a reasonable doubt that all the circumstances proved are consistent with the defendant having committed the act, but they must also be satisfied that the facts are such as to be inconsistent with any other rational conclusion than that the defendant is guilty. If there is any one single fact in this case proved to the satisfaction of the jury by a preponderance of the evidence, which is inconsistent with the defendant’s guilt, that is sufficient to raise a reasonable doubt and the jury should acquit the defendant.”

The exception to the court’s refusal to give the requested instruction is that it “correctly states the law of circumstantial evidence, and that this case is based almost entirely upon such evidence.” As declared in *State v. Postal Tel. Cable Co.*, 53

Mont. 104, 161 Pac. 953: "It is the rule in this state * * * that, where a conviction is sought upon circumstantial evidence alone, the circumstances proved must not only be consistent with each other and with the hypothesis of defendant's guilt, but inconsistent with any rational hypothesis other than his guilt." The trial court was informed by counsel, by their exception, that it was not the theory of the defense that the case depended upon circumstantial evidence alone, but that the case was based "almost entirely upon circumstantial evidence."

The latter part of the instruction offered is faulty in two particulars: First, it assumes that facts may be proven by a [4] preponderance of the evidence. An instruction on "preponderance of the evidence" has no place in a criminal trial (*State v. Felker*, 27 Mont. 451, 71 Pac. 668); all that is required is that the evidence introduced on behalf of the defendant is sufficient to raise a "reasonable doubt" of his guilt (*State v. Powell*, 54 Mont. 217, 169 Pac. 46). But this is unimportant, as the offered instruction but laid a heavier burden on the defendant than does the law. The second is that [5] the instruction does not correctly state the law of circumstantial evidence. The rule as to circumstantial evidence is that the circumstances proven to establish guilt must be taken as a whole; and if, considered as a whole, they are "inconsistent with any rational hypothesis" other than the defendant's guilt, they are sufficient to warrant a verdict of guilty.

The jury is not permitted to single out, as suggested by the offered instruction, "any one single fact" appearing anywhere in the evidence, and say, "Here is a circumstance which is inconsistent with the defendant's guilt." If such were the law, it is improbable that conviction could ever be had on circumstantial evidence. Thus, in *Whitlatch v. Fidelity etc. Co.*, 21 App. Div. 124, 47 N. Y. Supp. 331, the court said: "There has probably never been a case resting upon circumstantial evidence that did not admit of a theory or theories inconsistent with the conclusion to which all the circumstances, taken together, point with more or less accuracy. The strength of circumstances does not lie in segregating them into groups and drawing conclusions therefrom. Such a course may make them

point in many directions. Considered separately, they are no more than a false light. No course with respect to this character of proof can be followed with any degree of certainty, nor can results therefrom approximate to accuracy, except by considering such circumstances separately, and as a whole, giving to each its due weight, and then, from a consideration of the whole, drawing the conclusion. Any other rule destroys its value as evidence."

In *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 31 L. R. A. 294, 41 Pac. 998, this court said, in considering an instruction on circumstantial evidence: "We believe it to be correct that the prosecution need not prove beyond a reasonable doubt every circumstance offered in evidence which tends to establish the ultimate circumstances or facts on which it relies for a conviction"—although the court held that each *ultimate* fact or circumstance must be proved beyond a reasonable doubt.

Counsel do not attempt to point out any evidence of a nature to warrant the giving of the instruction as offered, and, even though the record should disclose some contradictory testimony, such an instruction is not justified.

That the rule above quoted is the rule in this state is emphasized by the statement of this court in *State v. Woods*, 54 Mont. 193, 169 Pac. 39, that "There is much conflict, however, upon the question whether they [certain calves] were furtively taken from their mothers while they were on the range in Fallon county and driven to the place where they were found. On these points the evidence is entirely circumstantial. It will serve no useful purpose to set forth and subject to critical analysis even those portions of it which point most directly to defendants' guilt. It is sufficient to say that the conflicts in it were resolved by the jury in favor of the truth of the state's witnesses; and that, accepting these statements as true, we think the evidence as a whole sufficient to meet the requirements of the rule that, where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other and point so clearly to the

guilt of the accused as to be inconsistent with any other rational hypothesis."

Counsel contend, however, that it was the duty of the court [6] to properly instruct as to circumstantial evidence, even in the absence of any request for an instruction, and cite authorities in support of this contention. Whatever the rule may be in other jurisdictions, under section 9271, Revised Codes, it would seem that no advantage could be taken of the error, if error was committed, where no proper instruction was offered. (*State v. Stone*, 40 Mont. 88, 105 Pac. 89; *State v. Brodock*, 53 Mont. 463, 164 Pac. 658.) However that may be, it is error [7] to fail to so instruct the jury only in cases depending entirely upon circumstantial evidence.

In an elaborate note on the subject of circumstantial evidence, found in 97 Am. St. Rep., at page 790, the rule governing here is stated as follows: "The general rule is that where the evidence is not entirely circumstantial the court need not charge thereon [citing cases]. So where the evidence of the prosecution is both direct and circumstantial, a charge requested as to the sufficiency of circumstantial evidence to authorize a conviction, ignoring direct evidence, is properly refused. * * * Any direct testimony will serve to dispense with the necessity of an instruction on circumstantial evidence [citing cases]."

Here counsel assumed, in presenting the requested instruction, that a conviction was not sought entirely on circumstantial evidence, and the court cannot now be put in error for adopting the theory upon which counsel presented the instruction.

(b) Counsel contend that evidence of a second offense was [8] permitted to go to the jury over their objection. The evidence referred to concerned the disappearance of the animal alleged to have been stolen, shortly after an indictment was returned against the defendant. The animal had theretofore been taken from the possession of one who purchased it from defendant and returned to the complaining witness. On the day following the action of the grand jury, the animal was placed, with other horses, in a pasture, from which it dis-

appeared at some time during the night. Witnesses were permitted to testify to seeing the defendant in the vicinity shortly before the disappearance, and to following the tracks of the animal with those of a saddle-horse from the pasture to within one and one-half miles of defendant's ranch, some fourteen miles distant. The animal was never found. This testimony tended to show a destruction or suppression of evidence by the defendant, and was clearly admissible as a circumstance tending toward defendant's guilt. From the record it is clear that it was introduced for no other purpose and the jury must have so understood the testimony.

(c) No instruction was offered by the defendant as to the [9] purposes for which the testimony was received, and one was hardly necessary. By not offering an instruction on the subject, the defense may be presumed to have been satisfied that none was necessary, and it would seem that the assignment of error came as an afterthought.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and COOPER concur.

MANDOLI, RESPONDENT, v. NATIONAL COUNCIL OF
KNIGHTS & LADIES OF SECURITY, APPELLANT.

(No. 4,229.)

(Submitted November 18, 1920. Decided December 13, 1920.)

[194 Pac. 493.]

Life Insurance—Warranties—Breach—Effect—Directed Verdicts.

Life Insurance—Policy—Application—Warranties—Breach.

1. Where a policy of life insurance makes the answers and statements in the application warranties, and constitutes them a part of the contract of insurance, an untrue statement concerning a matter of fact that is or ought to be within the personal knowledge of the applicant is a breach of the warranty and renders the policy void.

Representations of insured in application for life insurance as warranties, see note in 37 Am. St. Rep. 372.

Same—Application—False Answers—Breach of Warranties.

2. Where the answers of the applicant for a policy of life insurance, under the terms of which the answers were made warranties, to questions in the application whether she had suffered with rheumatism, hemorrhages or menstrual disorders, or whether she had consulted or had been treated by any physician or surgeon for any illness, disease or injury within five years previous to the date of the application, were untrue, the beneficiary could not recover.

Same—Conditions and Contingencies—Parties may Stipulate.

3. Parties to a contract of life insurance may stipulate that its validity shall depend upon conditions or contingencies embodied in the contract itself.

Directed Verdict—When Proper.

4. Where the evidence is in such a condition that if the case should be submitted to the jury, and a verdict for the plaintiff returned, it would be the duty of the supreme court to set it aside, a motion by defendant for a directed verdict should be granted.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by Andy Mandoli against the National Council of Knights and Ladies of Security. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Reversed.

Cause submitted on briefs of Counsel.

Mr. Chas. E. Avery, for Appellant, submitted a brief.

Whether it is proper to grant a nonsuit or direct a verdict in an action on a life policy is governed by the rules applicable to the trial of civil actions in general. (25 Cyc. 949.)

Where a material false representation or breach of warranty is shown by the uncontradicted evidence, and no waiver thereof by the insurer is proved, a nonsuit should be granted or a verdict directed for defendant. (25 Cyc. 951; *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 227, 50 Am. St. Rep. 80, 33 Atl. 902; *Finn v. Prudential Ins. Co.*, 98 App. Div. 588, 90 N. Y. Supp. 697; *Brady v. Industrial Benefit Assn.*, 79 Hun, 156, 29 N. Y. Supp. 768; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; *Mutual Reserve Fund Life Assn. v. Opp* (Miss.), 30 South. 69; *Smith v. Northwestern Mutual Life Ins. Co.*, 196 Pa. St. 314, 46 Atl. 426;

Grand Fraternity v. Keatley, 4 Boyce (27 Del.), 308, 88 Atl. 553; *Brisou v. Metropolitan Life Ins. Co.* (Ky.), 115 S. W. 785.)

Mr. John W. James and Mr. T. P. Stewart, for Respondent.

“The question of the truth or falsity of warranties in an application for insurance, where there is a conflict in the evidence, is a question of fact for the jury.” (*National Council etc. v. Owen*, 61 Okl. 256, 161 Pac. 178.)

In the case of *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, the suit was upon a policy of insurance and was defended upon the ground that the answers to the questions were false; that the answers were warranties, and therefore the policy was void from its inception. The court held that the answers were not warranties, but representations which need not be complied with literally.

The language in a similar policy was construed to be a statement and not a warranty. (*Supreme Lodge etc. v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.) Statements made in the policy, being in the nature of representations only, the question is of their substantial, and not their literal, truth. To defeat the policy, they must be shown to be materially untrue, or untrue in some particular material to the risk. We understand it to be a question for the jury to determine whether the facts which appear in evidence are so far inconsistent with the answers relied upon in the application as to establish a material misrepresentation. (*Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125.) Statements contained in the application for insurance will not be construed as warranties, unless the provisions in the application and policy taken together leave no room for any other construction; and, in order that such representation may constitute a defense to the action, it is incumbent on the insurance company to plead and prove that the statements and answers were made as written in the application; that they were false in some particular material to the insurance risk; that they were made intentionally by the insured, and that the insurance company relied and acted upon such statements. These are questions of fact and not questions of law. (*Kettenbach v. Omaha Life Assn.*, 49 Neb. 842,

69 N. W. 135, 138; *Goff v. Supreme Lodge etc.*, 90 Neb. 578, 37 L. R. A. (n. s.) 1191, 134 N. W. 239.)

The question as to whether or not Mrs. Mandoli had consulted a physician is also a question for the jury. (*Modern Woodmen of America v. Wilson*, 76 Neb. 344, 107 N. W. 568.)

The fact whether or not a statement made is a warranty or a mere representation must be determined by a construction of all the language in the application. (*Indiana Farmers' Livestock Ins. Co. v. Rundell*, 7 Ind. App. 426, 34 N. E. 588.)

In a case similar to the one at bar in many respects, wherein the question of misrepresentation was discussed, the court says: "If any construction can reasonably be put in the question and the answer such as will avoid forfeiture of the policy on the ground of falsity of the answer, that construction will be given and the policy will be sustained." (*Lyon v. United Moderns*, 148 Cal. 470, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, 4 L. R. A. (n. s.) 247, 83 Pac. 804; *Newton v. Southwestern Mut. Life Assn.*, 116 Iowa, 311, 90 N. W. 73.)

In the case of the *Northwestern Mut. Life Ins. Co. v. Woods*, it was held that the insured was bound only to the exercise of good faith and to answer truthfully as to all matters within his knowledge, and an omission to state a fact which is honestly deemed immaterial will not vitiate the policy even where the written statements in the application are warranted to be true. (*Northwestern Mut. Life Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189.)

A warranty in insurance law is the assertion by the assured of some fact on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact or the motive which prompted the assertion. A representation in insurance law is also the assertion by the insured of some fact, but the validity of the policy does not depend on the literal truth of the assertion. If a doubt exists as to whether a statement made is a warranty or a representation, it will be held a representation, and that warranties are not to be created or extended by construction. (*Aetna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, 4 Ann. Cas. 251, 94 N. W. 129.) Statements like those made by the insured in this case are facts

held to be representations in *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Supreme Lodge etc. v. Edwards*, 15 Ind. App. 524, 41 N. E. 850; *Northwestern Mut. Life Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122; *Anders v. Supreme Lodge Knights of Honor*, 51 N. J. L. 175, 17 Atl. 119; *Northwestern Benevolent & M. A. Assn. v. Cain*, 21 Ill. App. 471; *Modern Woodmen Acc. Assn. v. Shryock*, 54 Neb. 250, 39 L. R. A. 826, 74 N. W. 607.

Where an application for insurance refers to certain statements therein made as warranties, and the policy recites that the certificate is issued in consideration of representations and declarations made in the application, such statements are representations only and not warranties. (*Supreme Lodge, etc., v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.)

The case of *Farragher v. Knights & Ladies of Security*, 98 Kan. 601, 159 Pac. 3, appeals to us as being "on all-fours" with the case at bar recently passed upon, construing the very contract in question, that is, the contract of the Knights and Ladies of Security; and the questions here raised were therein passed upon in favor of our contentions.

MR. JUSTICE COOPER delivered the opinion of the court.

On the twenty-fifth day of March, 1916, Amy Mandoli was received into the local lodge and branch of the National Council of the Knights and Ladies of Security, at Anaconda, in this state, and, until her death on the tenth day of January, 1917, remained a member thereof in good standing. When she became a member of the society, there was executed and delivered to her a benefit certificate binding the defendant to pay to the beneficiary therein upon her death the sum of \$3,000. After proof of death, demand for payment was made upon the defendant society in conformity with the obligations assumed by it; but payment was refused upon the ground that the statements and warranties of the deceased contained in the application of the assured for membership did not disclose the

true condition of her health before or at the time of making the application. Plaintiff, the beneficiary named in the certificate, thereupon commenced his action to enforce payment.

The complaint alleges that at the time of her death, the assured was in good standing. It is set forth in the answer of the defendant that, but for the false and untrue statements contained in the application for membership, which the applicant warranted to be true, the certificate sued on would not have been issued. By replication, the plaintiff denied all the affirmative allegations of the answer, bringing to issue the question whether the statements and warranties were actually made, and the further question whether they were true or false. A trial was had before the court and a jury, resulting in a verdict for the plaintiff. A motion for a new trial was denied by the district court from whence these appeals come.

To bring into prominence the material points in issue, we quote first the statements of the applicant upon which the defendant was induced to issue the policy, *viz.*:

"I have not now, and never have had, and no physician has ever treated me for, * * * hemorrhages of any kind, rheumatism in any form, spitting or raising of blood. * * *

"Have you either consulted, or been treated, by any physician or surgeon within the past five years for any illness, disease, or injury? If so, give name and address of each and full particulars. No.

"Have you now or ever had any menstrual disorder? No."

The application contains the following agreement and warranty:

"I hereby certify that I am temperate in my habits, and I am in sound physical and mental condition, and I am a fit subject for life insurance.

"I hereby make application for a beneficiary certificate from the National Council of the Knights and Ladies of Security. And I hereby declare that the foregoing answers and statements are true, full, and correct, and I acknowledge and agree that the said answers and statements, with this application, shall form the basis of my agreement with the order, and constitute a warranty. I hereby make my medical examination a

part of this application and agree that this application and medical examination shall be considered a part of my beneficiary certificate, and together with the constitution and laws of the society as now existing or hereafter amended shall constitute my contract with the society.

"I further declare and agree that I have verified each of the foregoing answers and statements from 1 to 45, inclusive, and that I know and understand the contents hereof and that the answers and statements as written herein are as given by me."

If the answers to the questions propounded were not true, [1] they constituted breaches of warranty and the plaintiff is not entitled to recover. The law seems to be well settled that where a policy of insurance makes the answers and statements contained in the application, warranties and constitutes them a part of the contract of insurance, an untrue statement concerning a matter of fact that is, or ought to be, within the personal knowledge of the applicant, constitutes a breach of the warranty and renders the policy void. The question is not a new one in this jurisdiction. (*Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778.)

Mr. Bailey, a recent writer upon the subject of Life Insurance, states the rule as follows: "The substance of the decisions relating to the subject of warranty in insurance contracts is that the truth of all statements warranted to be true is a condition precedent to the liability of the insurer; for, if the statements so warranted are untrue, there is no contract." The author then quotes with approval the language of Mr. Chief Justice Brantly in the *Pelican Case* above cited, as follows: "The general rule is that a warranty must be a part and parcel of the contract, made so by express agreement of the parties upon the face of the policy. It is in the nature of a condition precedent and must be strictly complied with or literally fulfilled, to entitle the assured to recover on the policy. It need not be actually material to the risk; its falsity

will bar recovery because by the express stipulation the statement is warranted to be true, and thus is made material."

If, then, the answers of the insured given to the question [2] Whether she had suffered with rheumatism, hemorrhages or menstrual disorders, or whether she had consulted or had been treated by any physician or surgeon for any illness, disease or injury within five years previous to the date of the application, were untrue, the plaintiff cannot recover. In *Fish v. Metropolitan Life Ins. Co.*, 73 N. J. L. 619, 64 Atl. 109, the applicant had stated that he had not been under the care of a physician within two years prior to the application for insurance. The proof showed that he had been attended by a physician eight times for rheumatism in the shoulder. A plea setting up a breach of warranty was overruled in the trial court; but for the reasons indicated the case was reversed by the court of errors and appeals of the state of New Jersey, and a new trial ordered. To the same effect are *Cobb v. Covenant Mut. Benefit Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619, 10 L. R. A. 666, 26 N. E. 230; Bacon on Life and Accident Insurance, sec. 284, and cases cited; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

The law recognizes the competency of applicants for insurance to make agreements of binding force, and if, upon a reasonable interpretation of all the stipulations of the parties, such was the contract, it is the duty of the court to [3] enforce it according to its terms. Parties to a contract of life insurance are not forbidden to stipulate that its validity shall depend upon conditions or contingencies embodied in the contract itself. (*Jeffries v. Economical Mut. Life Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833; *Aetna Life Ins. Co. v. France*, 91 U. S. 510, 23 L. Ed. 401; *Northern Assur. Co. v. Grand View Building Assn.*, 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133; *Aetna Life Ins. Co. v. Moore*, 231 U. S. 543, 58 L. Ed. 356, 34 Sup. Ct. Rep. 186; *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 28 L. Ed. 447, 4 Sup. Ct. Rep. 466 [see, also, Rose's U. S. Notes].)

The application and the policy in suit, attached together, were made a part of the complaint, and conform in all re-

spects to the requirements of section 5608 of the Revised Codes, and of Chapter 140, page 403, Laws of 1911 (Rev. Codes, Supp. 1915, p. 906). The signature of the deceased to the application was identified by Andy Mondoli, the husband of the assured, and, together with the policy, were admitted in evidence upon the trial. The only issue for decision, therefore, was: Were the statements and warranties appearing in the application for a certificate true or false?

In the certificate itself the following appears: "This beneficiary certificate is issued by said National Council and accepted by the member only upon the following express warranties, conditions and agreements:

"1. That the application for membership in this order, made by the said member, together with the report of the medical examiner, which is on file in the office of the National Secretary, and both of which are made a part hereof, are true in all respects, and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of the order to said member, or said member's beneficiaries, the same as if fully set forth in this certificate, and that the application and medical examination herein referred to and the constitution and laws of the society as the same now exist or as may be hereafter enacted, and this beneficiary certificate shall all be construed together as forming parts of the contract between the National Council and the member.

"2. That if said application and medical examination shall not be true in each and every part thereof, then this beneficiary certificate shall as to said member, or said member's beneficiaries, be absolutely null and void."

Dealing now with the specific facts: If it appears by the undisputed testimony that the assured had been treated by a physician or surgeon for illness, disease or injury within five years prior to the making of the application, there was nothing requiring the court to submit the case to the jury, and the defendant's motion for a verdict in its favor should have been granted. The following testimony bearing on the application of the questions and answers therein is uncontroverted, and its effect is not avoided by anything in the record before us:

Dr. A. J. Willetts, called as a witness for the defendant, testified that he was a physician and surgeon, and that he was called to treat the deceased three times previous to her death, and, quoting his language: "October 11, 21 and 30, in 1915, I saw her on three occasions. What I treated her for was disturbance of the stomach, and I did not treat her for anything else. I made an examination of her, a physical examination, fairly complete, of the stomach and pelvic organs, for the purpose of determining what the cause of her symptoms was. Her symptoms were nausea, vomiting and amenorrhea. Q. The absence of menstruation would indicate what? A. The commonest cause is pregnancy. I examined her for the purpose of determining whether or not she was pregnant, and I concluded that she was pregnant. As regards how long it had been since she had menstruated, well, the only way I could tell that was what she told me. I have no way of knowing whether or not menstruation had been absent at all, except her declaration that it had been absent three or four months. If she was not pregnant, the interruption of menstruation for that period of time in a young and healthy woman would constitute a menstrual disorder of some importance; in the absence of other symptoms, one could not say whether it was a serious matter or not, but definitely a menstrual disorder is absolutely abnormal with a young healthy woman in the absence of pregnancy, not to be menstruated."

Dr. J. M. Sligh testified as follows: "I had occasion to treat Mrs. Mandoli personally; as near as I can recollect that was the latter part of November, 1915, and the fore part of December following. I treated her at her home and that of her mother. I first treated her for rheumatism. I paid two or three visits to her house. I made three or four visits to her mother's house. At her mother's house I treated her for persistent hemorrhage of the nose, lasting upward of 24 hours, I believe. I had to pack the nose twice; that was a severe hemorrhage. I treated her probably a month or two prior and also after that time and prior to March, 1916; that was at my office and at her mother's house. I do not remember exactly the dates of those visits." On cross-examination he

testified: "I treated her at that time, as I say, for rheumatism—muscular rheumatism over the body generally, particularly in the legs. When I visited her, she was not confined to her bed; she said she had been previously. I told her she had rheumatism. * * * The general condition of Mrs. Mandoli's health at that time was that she was very much run down. A few days after that I visited her at her mother's house, three or four times; that was for hemorrhage from the nose, bleeding; hemorrhage means bleeding. I mean a bleeding from the nose. That was at her mother's house. * * * The condition I found there that I diagnosed as rheumatism might possibly have had its origin in the same thing as the cold, or from exposure or wet. It is not rather unusual for rheumatism to disappear in two or three days; muscular rheumatism may disappear in that time. She did not have any aggravated rheumatic conditions at that time, beyond the difficulty in walking, pain in walking, muscular pain. In regard to what examination I made at that time to determine whether or not this was rheumatism, well, I determined simply from symptoms; I made no physical examination, beyond questioning. I took largely her statement as to how she felt; and on this statement and without an examination I say now that in my opinion it was rheumatism. I thought so then, and her symptoms improved under the treatment given."

The plaintiff, Andy Mandoli, the beneficiary under the policy and the husband of the insured, testified that his wife had "a kind of a pain on the knee and leg and a kind of cold, and they found that there was a kind of rheumatism, a little cold or la grippe, or something like that, but nothing serious about it. That pain lasted two or three days, and in the meantime she showed a cold in the head. * * * She did not have rheumatism for more than a year, only rheumatism four or five days, a little pain two or three days at the most. * * * Dr. Sligh treated my wife for rheumatism and for hemorrhage of the nose at that time; two or three times, I guess. I do not think I was present when Mrs. McCallum rubbed my wife's limbs there on account of rheumatism; I

was there once, but I did not stay but a few minutes over there."

Against the statement contained in the application of the insured that she had not, within five years previous to the making of her application for insurance, either consulted, or received treatment from, any physician or surgeon for "any illness, disease or injury," there is the testimony, above set out, of two attending physicians who had treated her for rheumatism, hemorrhages and menstrual disorders, and the unqualified admission of her husband that she had been attended by the physicians called as witnesses, and had received the medical treatment described by them. Considered in the most favorable light possible, the above incorrect statements of fact were material representations amounting to warranties, and, nothing else appearing in the record, if known to be untrue by the assured when made, invalidate the policy, without further proof of actual conscious design to defraud.

At the close of all the testimony the defendant moved for a directed verdict, upon the ground that the proof relating to the fact concerning the attendance of physicians upon the deceased was not contradicted, and was at variance with the statements made in her application for membership and medical examination, and the fact that the testimony of the physicians was not denied, raised a question of law to be decided by the court. The motion was denied. It should have been granted. There was nothing requiring the court to submit the case to the jury. The rule obtains, where the evidence [4] is in such a condition that, if the case should be submitted to the jury and a verdict for the plaintiff returned, it would be the duty of this court to set it aside, the motion for a directed verdict should have been granted. (*Escallier v. Great Northern Ry. Co.*, 46 Mont. 251, Ann. Cas. 1914B, 468, 127 Pac. 458; *Loudon v. Scott*, ante, p. 645, 194 Pac. 488.)

Proceeding thence with the trial, and consistent with the theory adopted and followed by the parties, the presiding judge, with characteristic clearness and ability, instructed the jury in conformity with the law above suggested, and, among

other instructions, gave the following: "The statements in the application which are made a part of the policy, are warranties of the truth of the statements therein contained; and if you believe from the evidence that any of said statements are untrue in any respect, whether material or immaterial, they avoid the policy and the plaintiff cannot recover. The truth of the statements contained in the application which are made a part of the policy is the basis of the contract between the parties to this controversy, and if you believe from the evidence that any of said statements in said application are untrue, then you must find for the defendant."

The defendant contracted to pay the policy upon the condition that the statements and warranties embodied in the application were true in fact, and not otherwise. By the showing made it appears they were untrue. Yet by the verdict and judgment each and every member of defendant society is to be subjected to the payment of his or her proportion of the face of the policy, in spite of the fact that neither by its letter nor its spirit did the parties contemplate any such thing. Upon the whole, we are unable to find a substantial conflict in the evidence upon the falsity of the statements warranted to be true, or to escape the conviction that sympathy played the major part in bringing about the verdict for the plaintiff.

The judgment and order appealed from are reversed and the cause is remanded to the district court of Deer Lodge county, with direction to dismiss the action.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY, HURLY and MATTHEWS concur.

STATE EX REL. STRANAHAN, RELATOR, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 4,762.)

(Submitted December 13, 1920. Decided December 18, 1920.)

[194 Pac. 308.]

*Intoxicating Liquors — Prohibition Act — Validity — Federal
Constitution — Eighteenth Amendment — Supervisory Con-
trol.*

Intoxicating Liquors—Federal Constitution—Effect of Eighteenth Amend-
ment.

1. *Held*, that in adopting the eighteenth amendment to the federal Constitution, the states did not deprive themselves of the power to make laws for their internal government upon the subject of intoxicating liquors, but merely surrendered the power to legalize and permit the traffic, retaining the right to enforce within their own territory provisions against violations of the acts prohibited thereby; and so long as legislation of a state actually seeks to enforce by appropriate legislation what is prohibited by such amendment, it is not objectionable, even though the state law may differ from that of Congress.

Same—Enforcement of Prohibition—Concurrent Federal and State Authority.

2. By section 2 of the eighteenth amendment to the federal Constitution, providing that the several states shall have concurrent jurisdiction to enforce the provisions of the amendment, a dual authority in this respect is established, coextensive on the part of federal and state authorities within the boundaries of the state.

Same—Prohibition Act—Validity.

3. The fact that Chapter 175, Laws of 1917, prohibiting the liquor traffic, was enacted prior to the adoption of the eighteenth amendment does not render it inoperative, since it has the same purpose in view as that embraced in the amendment, and the provision in section 2 of the amendment authorizing the states to enforce it by "appropriate legislation" not of necessity requiring future legislation if existing laws are adapted to that end.

Same—Single Act Constituting Violation of Federal and State Laws—No Objection to Validity of State Act.

4. That a single act may constitute an offense against both federal and state laws against traffic in intoxicating liquors, for which defendant may be tried and convicted by either government, or by both, is not an objection to the validity of Chapter 175, Laws of 1917.

Criminal Law—Former Jeopardy—Waiver.

5. The plea of former jeopardy is a privilege of which one accused of crime may or may not avail himself, and which he may waive.

Supervisory Control—Defenses.

6. Since defendants, charged with a violation of the Prohibition Act and discharged by the trial court on the ground that the Act

Whether appeal by government after acquittal constitutes second jeopardy, see notes in 1 Ann. Cas. 664; Ann. Cas. 1913C, 772.

was inoperative, were not parties in a proceeding under writ of supervisory control requiring the court to show cause why the order of discharge should not be set aside, it (the court) could not defend on the ground that the issuance of the writ would place defendants in jeopardy a second time.

Same—Exigency Warranting Issuance of Writ.

7. A holding of the district court that the Prohibition Act (Chap. 175, Laws 1917) was inoperative, by reason of which the prosecuting officers were rendered powerless to enforce its provisions in the judicial district, *held* to have created a sufficient exigency to warrant the issuance of writ of supervisory control to review the court's decision.

Original application for writ of supervisory control to the District Court of the Eighteenth Judicial District, and F. E. Carleton, Judge thereof, to annul an order in effect declaring Chapter 175, Laws of 1917, inoperative. Writ issued.

Mr. Albert A. Grorud, Assistant Attorney General, and *Mr. C. R. Stranahan*, County Attorney of Hill County, argued the cause orally.

Mr. Wm. T. Pigott, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HURLY delivered the opinion of the court.

An information was duly filed in the district court of Hill county charging Henry Dees, Ted Oltsvig and Paul Glenn with the crime of unlawfully introducing intoxicating liquors (whisky and beer) into the state of Montana on or about June 14, 1920. To this information the defendants entered pleas of not guilty, and upon the twenty-first day of September were placed upon trial. After a jury had been impaneled and sworn, the defendants objected to the introduction of any testimony upon the ground that the information fails to state a public offense; the point being that, our law against the traffic in intoxicating liquors having been enacted prior to the adoption of the eighteenth amendment to the federal Constitution and the passage of the Volstead Act (41 Stat. 305) by Congress, it is no longer operative. This objection was sustained, the jury discharged, and the defendants released.

The state, upon relation of the county attorney of Hill county, thereupon applied to this court for a writ of supervisory control, directed to the said district court and the judge

thereof, requiring that cause be shown why the order complained of should not be annulled. An order to show cause was issued, returnable on the thirteenth day of December, 1920, at which time respondent judge filed demurrer upon the grounds that the application does not state facts and circumstances nor any exigency sufficient to entitle petitioner to invoke the discretion or power of the court in awarding the remedy sought.

The statute upon which the prosecution was based is found in Chapter 175 of the Laws of 1917. This Act by its terms became operative on and after December 31, 1918. The eighteenth amendment, ratified in 1919, is as follows:

“Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

“Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.”

In accordance with the authority conferred by the amendment, Congress enacted the so-called Volstead Act (41 Stat. at Large, Chap. 85, Acts of the Sixty-sixth Congress, First Session), sometimes referred to as the National Prohibition Law.

In the case of *Rhode Island v. Palmer*, 253 U. S. 350, 64 L. Ed. 613, 40 Sup. Ct. Rep. 486, 588, the supreme court of the United States upheld the validity of the amendment, and also sustained the Volstead Act as a valid exercise of the powers of Congress thereunder. In the opinion, paragraphs 6, 7, 8 and 9, it was said:

“6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative Act, whether by Con-

gress, by state legislature, or by a territorial assembly, which authorized or sanctions what the section prohibits.

“7. The second section of the amendment—the one declaring ‘the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation,’—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

“8. The words ‘concurrent power’ in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

“9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.”

The opinion does not define the authority of the states nor the limits to which their legislation may be carried for the enforcement of the amendment. In the special concurring opinion by Mr. Chief Justice White he said: “The power which it gives to state and nation is, not to construct or perfect or cause the amendment to be completely operative, but, as already made completely operative, to enforce it. Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement.” Again: “Limiting the concurrent power to enforce given by the second section to the purposes which I have attributed to it, that is, to the subjects appropriate to execute the amendment as defined and sanctioned by Congress, I assume that it will not be denied that the effect of the grant of authority was to confer upon both Congress and the states

power to do things which otherwise there would be no right to do."

In adopting the amendment, the states did not deprive [1] themselves of the power to make laws for their internal government upon the subject of intoxicating liquors. Though conferring additional powers upon Congress, they merely surrendered the power to legalize and permit a traffic now forbidden, and retained the right to enforce within their own territory provisions against violations of the acts prohibited thereby.

The fact that under the amendment Congress may enact a law, national in its scope, and that the states may likewise enact laws effective within their own boundaries, may give rise to a situation by which the laws of each state may differ from those of each other, and also differ from the laws of Congress upon the same subject. Such state laws may not permit that which the first section of the amendment forbids, nor may Acts of Congress do so. But so long as legislation of a state actually seeks to enforce, by appropriate legislation under the second section of the amendment, what is prohibited by the first, no valid objection can be made, even though the state law may differ from that of Congress. The authority of the states is not to enforce the Acts of Congress, but to enforce the amendment itself.

It is true that Article VI of the federal Constitution provides: " * * * The Constitution, and the laws * * * which shall be made in pursuance thereof, * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Were section 1 the only portion of the amendment to be passed upon, it [2] would have to be conceded that the power of the federal government was dominant. But section 2 is now as much a part of the federal Constitution as is Article VI. If every word and every sentence of a Constitution is to be given effect where it is possible to do so, we think it apparent that the amendment creates a departure from principles long established, in providing a dual authority, coextensive on the part

of federal and state authorities within the boundaries of the particular state. In addition, it seems to us that the rule of statutory construction that a general provision must give way to, or be considered as controlled by the adoption of, a special one, would lead to the conclusion that the amendment, being special in its nature, would be controlling over Article VI in instances to which the provisions of the amendment are applicable.

That our prohibition law was enacted prior to the adoption [3] of the amendment does not thereby render it inoperative. If such prior legislation permitted that which the amendment prohibits, another question would be involved. The same point was urged in *Commonwealth v. Nickerson* (Mass.), 128 N. E. 273. The Massachusetts liquor law, enacted prior to the adoption of the amendment, was attacked. Certain provisions of that law were held inoperative in so far as they permitted sales in contravention of the terms of the amendment. The state statute, however, forbade the sale of whisky, for the illegal sale of which the defendant had been convicted. The court took judicial knowledge of the fact that whisky is an intoxicating liquor, the sale of which is forbidden by the amendment and by the previously enacted law of the state. (Rev. Laws, Chap. 100.) It was there said: "The circumstance that R. L., Chapter 100, was enacted prior to the adoption of the eighteenth amendment does not prevent it from being 'appropriate legislation' to enforce that amendment. The words 'appropriate legislation' in that amendment do not of necessity require future and exclude existing legislation. A state law already enacted is within the purview of the words 'appropriate legislation' as used in the eighteenth amendment. If existing legislation is adapted to the end in view, it is enforceable." (See, also, *Ex parte Ramsey* (D. C.), 265 Fed. 952.)

That a single act may constitute an offense against both state [4] and national authority for which a defendant may be tried and convicted by either state or federal government, or by both, does not create a new or anomalous situation. As

said by the supreme court of the United States in *Fox v. Ohio*, 5 How. 410, 12 L. Ed. 213 [see, also, Rose's U. S. Notes], "It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy and action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." (See, also, *Ex parte Siebold*, 100 U. S. 371, 25 L. Ed. 717; *United States v. Amy*, 14 Md. 149; *Reid v. Colorado*, 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. Rep. 92 [see, also, Rose's U. S. Notes].) See, also, additional authorities cited in *Commonwealth v. Nickerson*, *supra*.

We have read with much interest and care the able and exhaustive opinion of Mr. Justice Rugg of the supreme judicial court of Massachusetts in *Commonwealth v. Nickerson*, *supra*, where each of the questions hereinbefore referred to is discussed. Except in so far as we have above indicated a somewhat different view, we agree fully with the views so ably there set forth.

It is earnestly contended that no exigency exists justifying [5, 6] the granting of the remedy sought to be invoked, and that by so doing the defendants may be placed in a second jeopardy for the offense with which they are charged. The plea of former jeopardy is a privilege of the accused of which they may or may not avail themselves, and which they may waive. (16 C. J. 285, and cases cited.)

The defendants in the criminal cause are not parties to the proceeding, nor do we know whether they will again be placed upon trial. If they shall be, and shall then enter pleas of former jeopardy, the court at that time will be in position to pass upon and determine the legal effect thereof. (*State*

v. *Herron*, 12 Mont. 300, 30 Pac. 140; *State v. Mjelde*, 29 Mont. 490, 75 Pac. 87.)

The district court has in effect ruled that our law prohibiting [7] traffic in intoxicating liquors is inoperative, unconstitutional and entirely void—a view with which we do not agree. It is plainly apparent that the prosecuting officers of the state are powerless to institute criminal proceedings in the district court of Hill county and in the entire eighteenth judicial district for violation of such laws. Such situation creates an exigency sufficient to justify this court in determining the question involved.

The order of the district court is therefore annulled.

ASSOCIATE JUSTICES HOLLOWAY, MATTHEWS and COOPER concur.

MR. CHIEF JUSTICE BRANTLY: I concur in the result reached by Mr. Justice HURLY, but with much reluctance, because I am not satisfied that any exigency is shown to exist calling for interference by this court to annul the order complained of.

PERKINS & CO., RESPONDENT, v. DULUTH BREWING & MALTING CO., ET AL., APPELLANTS.

(No. 4,230.)

(Submitted November 19, 1920. Decided December 18, 1920.)

[194 Pac. 157.]

Conversion—Action by Chattel Mortgagee—Allegation of Ownership—Complaint—Insufficiency.

Conversion—Action by Chattel Mortgagee—Allegation of Ownership—Complaint—Insufficiency.

1. *Held*, that the complaint in an action to recover possession of chattels, covered by mortgage, alleged to have been unlawfully seized and wrongfully detained by defendants, was insufficient in the absence of an averment that plaintiff mortgagee was the owner and holder of the notes secured by the mortgage at the date of conversion.

Appeal from District Court, Richland County; C. C. Hurley, Judge.

ACTION by W. L. Perkins & Co. against the Duluth Brewing & Malting Company and others. Judgment for plaintiff and defendant Jack Bennett, Sheriff, appeals. Reversed.

Messrs. Lunke & Shea, for Appellants, submitted a brief and one supplemental thereto; *Mr. R. O. Lunke* argued the cause orally.

Mr. C. E. Comer and *Mr. Carl L. Brattin*, for Respondent, submitted a brief.

MR. JUSTICE COOPER delivered the opinion of the court.

This is an action in replevin by a mortgagee to recover possession of personal property covered by two chattel mortgages, of the agreed value of \$1,000, alleged to have been unlawfully seized and wrongfully detained by the defendants.

To the complaint defendants filed a general demurrer. Thereafter an order was made transferring the cause from the district court of Sheridan county to the district court of Richland county, where the demurrer was overruled. Defendants answered, and a trial by the court followed. Plaintiff had judgment, and from it defendant Bennett appeals.

Before the introduction of proof the defendants interposed a general objection to the admission of any evidence, upon the ground that the complaint failed to state a cause of action. The objection was overruled, to which ruling defendants objected. To like rulings made during the trial and at its close exceptions were taken.

In the supplemental brief of appellant it is urged that the [1] case of *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413, is decisive of the point upon which this appeal turns, in that the complaint nowhere alleges the ownership of the notes and mortgages to be in the plaintiff. That case so nearly resembles the one at bar that the decision must be regarded as conclusive of this appeal. Writing the opinion for this court, Mr. Justice Holloway there said: "The only question for determination is: Does the complaint state facts sufficient to constitute a cause of action? The action is by a mortgagee, whose only interest in the property, so far as

the complaint discloses, is the lien secured to a mortgagee out of possession. * * * The mere allegation that the first note was executed on August 1 and the second on October 15, 1901, does not imply continued ownership or nonpayment of the notes. * * * If the plaintiff was not the owner of the notes at the date of the alleged conversion, or if the notes had been paid, he could have suffered no injury; for a transfer of the notes would operate to transfer the mortgages, or payment of the notes would operate to discharge the mortgages, and the necessity for an allegation that the plaintiff was the owner and holder of the notes in question, and that they had not been paid, or, if paid in part, the amount then due upon them at the date of the alleged conversion, is apparent." The rule there laid down has been approved on two occasions since. (*J. I. Case Threshing Machine Co. v. Simpson*, 54 Mont. 316, 170 Pac. 12, and *Young v. Bray*, 54 Mont. 415, 170 Pac. 1044.)

In *J. I. Case Threshing Machine Co. v. Simpson*, *supra*, a general demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action was seasonably interposed, and for a like reason, upon the trial, objection was made to the admission of any testimony. There, as here, the complaint alleged that certain payments were made, and that a balance, principal and interest, still remained due upon the promissory notes sued upon, but there was no allegation that the plaintiff was the owner and holder. Each of the notes was made payable to "J. I. Case Threshing Machine Co. (Incorporated), or bearer." Emphasizing the rule announced in the former case, Mr. Justice Holloway uses this language: "Assuming that the payee and plaintiff are the identical corporation, the complaint still fails to disclose that this action is prosecuted in the name of the real party in interest, as required by section 6477, Revised Codes. The complaint does not allege that the notes were made, executed or delivered to the plaintiff, or that plaintiff is the owner or holder thereof, or that the amount due upon the indebtedness is due to the plaintiff. Section 6573, Rev. Codes. * * * A holder of a negotiable instrument may maintain an action for its collection (sec. 5899, Rev. Codes); but, to state a cause

of action in favor of plaintiff, it was necessary to disclose some right in it by virtue of which it maintains the action and upon the faith of which defendant, by paying the judgment, may be fully discharged of his obligation and relieved of the annoyance of further litigation at the hands of someone else who may hereafter appear in possession of the notes."

The allegation of the complaint here merely is "that the plaintiff is and has been during all the times hereinafter mentioned entitled to the immediate possession" of a stock of goods which the defendants seized and have wrongfully detained since the second day of March, 1914. This may be true in point of fact; but the substantial defect pointed out is neither aided by the pleadings of the opposite party nor was it remedied in the proof upon the trial. Whether the absence of that essential averment was due to oversight or design makes no difference. We should not be obliged to resort to far-fetched legal inferences to supply matters indispensable to the adjustment of a controversy between the parties to it. The defendants were entitled to be so confronted with the issue as to whether the plaintiff was the real party in interest or not that, if the question again became the subject of dispute between them, the judgment itself would be a complete answer thereto. In this case that requirement has not been met.

The judgment and order are reversed.

Reversed.

MR. CHIEF JUSTICE BRANTLY and ASSOCIATE JUSTICES HOLLO-
WAY and MATTHEWS concur.

MR. JUSTICE HURLY, deeming himself disqualified, takes no part in the foregoing decision.

MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 4,601.—JOS. H. SCHMUKE, RESPONDENT, *v.* CHICAGO, MIL. & ST. PAUL RY. CO., APPELLANT.

Appeal from District Court of Gallatin County; Ben B. Law, Judge.

Decided May 8, 1920.

PER CURIAM.—Pursuant to motion of appellant herein, the appeal in the above-entitled cause is dismissed.

Mr. Charles J. Marshall, for Appellant.

Mr. H. C. Carlson, for Respondent.

No. 4,606.—STATE EX REL. B. O'GRADY, RELATOR, *v.* DISTRICT COURT IN AND FOR SHERIDAN COUNTY ET AL., RESPONDENTS.

Original application for Writ of Certiorari.

Decided May 8, 1920.

PER CURIAM.—It appearing from the statement of counsel made in open court at the hearing of the order to show cause that the claims against Sheridan county out of which the proceeding arose were allowed and ordered paid before the order to show cause was issued, and that only a moot question re-

mains for decision, the cause is, upon motion of counsel for relator, dismissed.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Relator.

Mr. Howard M. Lewis, for Respondents.

No. 4,161.—C. L. REED ET AL., RESPONDENTS, v. W. B. JORDAN, APPELLANT.

Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.

Decided May 19, 1920.

PER CURIAM.—Pursuant to motion of appellant, the appeal in the above-entitled cause is dismissed.

Mr. Sharpless Walker and *Mr. W. C. Packer*, for Appellant.

Mr. Geo. W. Farr, for Respondent.

No. 4,642.—STATE EX REL. WM. SPIDEL, RELATOR, v. HARRY BARR ET AL., RESPONDENTS.

Original application for Writ of Mandate.

Decided May 19, 1920.

PER CURIAM.—The application for writ of mandate herein, heretofore presented, is denied.

Mr. John J. Jewell, for Relator.

No. 4,221.—BARCLAY-BOOTH ABSTRACT CO., RESPONDENT, v. R. D. LEGGAT, APPELLANT.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Decided May 27, 1920.

PER CURIAM.—Pursuant to stipulation of the parties, the appeal in the above-entitled cause is dismissed.

Messrs. Frank & Gaines, for Appellant.

Messrs. Nolan & Donovan, for Respondent.

No. 4,649.—STATE EX REL. JOHN G. BROWN, RELATOR, v. GEO. P. PORTER, STATE AUDITOR, RESPONDENT.

Original application for Writ of Mandate to compel respondent to issue a warrant in payment of services rendered by relator as attorney for the State Board of Equalization.

Decided May 28, 1920.

PER CURIAM.—The application of relator for writ of mandate is denied, the court being of opinion that application for relief should be made to the district court.

Mr. John G. Brown, pro se.

No. 4,169.—STATE EX REL. ANDREW LARSON, RESPONDENT, v. R. L. WYMAN, COUNTY CLERK, APPELLANT.

Appeal from District Court, Dawson County; C. C. Hurley, Judge.

Decided May 29, 1920.

PER CURIAM.—This cause having been set for hearing and taken under advisement, it is ordered and adjudged that, no briefs having been filed, the judgment of the court below made on August 29, 1917, be and it is affirmed.

Mr. H. J. Haskell and Mr. J. A. Slattery, for Appellant.

Mr. F. P. Leiper, for Respondent.

No. 4,656.—STATE ~~EX~~ REL. GORDON CAMPBELL, RELATOR,
v. DISTRICT COURT OF THE FIFTEENTH JUDICIAL DISTRICT ET AL., RESPONDENTS.

Original application for Writ of Supervisory Control.

Decided June 5, 1920.

PER CURIAM.—The application of relator for writ of supervisory control this day presented is, after due consideration by the court, denied.

Messrs. Belden & De Kalb, for Relator.

No. 4,667.—IN RE PETITION OF CHRISTIAN YEGEN, SR.

Original application for Writ of Supervisory Control in aid of Writ of Habeas Corpus.

Decided June 17, 1920.

PER CURIAM.—The application of relator for writ of supervisory control in aid of *habeas corpus* is after due consideration by the court, denied.

Messrs. Walsh, Nolan & Scallon, for Petitioner.

No. 4,571.—STATE, RESPONDENT, v. RAY A. COBBAN,
APPELLANT.

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

Decided June 21, 1920.

PER CURIAM.—Pursuant to motion of appellant, the appeal herein is dismissed.

Mr. Lyman J. Roscow and Mr. J. J. McCaffery, for Appellant.

No. 4,663.—STATE, RESPONDENT, v. M. O. DUFFY,
APPELLANT.

Appeal from District Court, Valley County; John Hurly, Judge.

Decided June 26, 1920.

PER CURIAM.—The motion of respondent that the appeal herein be dismissed for failure of appellant to file transcript within time is granted and the appeal is accordingly dismissed.

MR. JUSTICE HURLY, being disqualified, takes no part in the order of dismissal.

S. C. Ford, Attorney General, for Respondent.

No. 4,684.—STATE *EX REL.* FARMERS' ELEVATOR CO.
ET AL., RELATORS, *v.* DISTRICT COURT OF THE FIF-
TEENTH JUDICIAL DISTRICT ET AL., RESPONDENTS.

Original application for Writ of Supervisory Control.

Decided July 14, 1920.

PER CURIAM.—The applications of relators for writ of supervisory control is after due consideration denied.

Mr. M. J. Lamb, Messrs. Jeffries & McNaught and Messrs. Madeen & Russell, for Relators.

No. 4,417.—THE AUERBACH MINING & MILLING CO.,
RESPONDENT, *v.* PHILIPSBURG MINING CO., APPEL-
LANT.

*Appeal from District Court, Granite County; Geo. B. Win-
ston, Judge.*

Decided July 14, 1920.

PER CURIAM.—Upon motion of appellant, the appeal in the above-entitled action is dismissed.

Mr. W. E. Moore and Mr. Chas. R. Leonard, for Appellant.

No. 4,637.—STATE, APPELLANT, *v.* MELVIN JOHNSON,
RESPONDENT.

Appeal from District Court, Pondera County; John J. Greene, Judge.

Decided July 14, 1920.

PER CURIAM.—On motion of appellant, the appeal in the above-entitled cause is dismissed.

Mr. S. C. Ford, Attorney General, for Appellant.

No. 4,691.—STATE EX REL. C. O. WALDEN ET AL., RELATORS,
v. DISTRICT COURT OF THE NINTH JUDICIAL
DISTRICT ET AL., RESPONDENTS.

Original application for Writ of Supervisory Control.

Decided July 24, 1920.

PER CURIAM.—Relators' application for writ of supervisory control is denied.

Mr. John W. Stanton, for Relators.

Nos. 4,685 and 4,686.—STATE EX REL. STEPHEN ELY,
RELATOR, v. S. V. STEWART, GOVERNOR.

Original application for Writ of Mandamus.

Decided July 26, 1920.

PER CURIAM.—This cause, heretofore submitted, this day came on for judgment and decision; whereupon, on consideration, it is ordered and adjudged that the motion to quash the alternative writ issued herein be and it is sustained and the proceedings dismissed.

Messrs. Nolan & Donovan, for Relator.

Mr. Jas. A. Walsh, *Mr. Wm. Johnston*, *Mr. Sydney Sanmer*
and *Mr. Henry C. Smith*, for Respondents.

No. 4,368.—STATE, RESPONDENT, v. JOE MILCH, APPELLANT.

*Appeal from District Court of Lewis and Clark County;
W. H. Poorman, Judge.*

Decided September 14, 1920.

PER CURIAM.—Pursuant to motion of appellant herein, showing that the trial court has granted appellant a new trial, his appeal from the judgment of conviction is dismissed.

Mr. Henry C. Smith, for Appellant.

**No. 4,616.—STATE, APPELLANT, v. AMELIA KOBLE,
RESPONDENT.**

*Appeal from District Court, Hill County; W. B. Rhoades,
Judge.*

Decided September 14, 1920.

PER CURIAM.—The motion of respondent to dismiss the appeal herein for the reason that the appellant has failed to file and serve its brief within the time allowed by the rules of this court and by the stipulation of counsel extending the time is granted and the appeal accordingly dismissed.

Mr. C. R. Stranahan and Mr. A. Lee Golden, for Appellant.

Mr. Victor R. Griggs, for Respondent.

No. 4,658.—GOTTLIEB LUX ET AL., RESPONDENTS, v. J. J. SMITH, APPELLANT.

Appeal from Hill County; Frank E. Carleton, Judge.

Decided September 14, 1920.

PER CURIAM.—The motion of respondents that the appeal herein be dismissed for failure of appellant to serve and file his brief within time is granted and the appeal is accordingly dismissed.

Mr. R. E. Hammond, for Appellant.

Mr. H. S. Kline and Mr. Chas. B. Elwell, for Respondent.

No. 4,713.—BUTTE ELECTRIC SUPPLY CO., RESPONDENT, v. ROYAL INDEMNITY CO., APPELLANT.

Appeal from District Court, Silver Bow County.

Decided September 14, 1920.

PER CURIAM.—Pursuant to motion of respondent that the appeal herein be dismissed for failure of appellant to file transcript within time, the appeal is dismissed.

Henry C. Levinski, for Respondent.

No. 4,697.—BUTTE BUICK CO., RESPONDENT, v. SILVER
BOW COUNTY, APPELLANT.

Appeal from District Court, Silver Bow County.

Decided September 14, 1920.

PER CURIAM.—Pursuant to motion of appellant made by the attorney general, acting upon request of appellant, that the appeal herein be dismissed, the motion is granted and the appeal dismissed.

Mr. S. C. Ford, Attorney General, for Appellant.

No. 4,602.—ROUNDUP OIL & GAS CO. ET AL., RESPONDENTS,
v. CHARLES A. VIRGILS ET AL., APPELLANTS.

Appeal from District Court, Musselshell County; Geo. P. Jones, Judge.

Decided September 14, 1920.

PER CURIAM.—Pursuant to stipulation of the parties, the appeal in the above-entitled cause is dismissed.

Mr. V. D. Dusenbery, for Appellants.

Messrs. Nichols & Wilson and *Messrs. Jeffries & McNaught*,
for Respondents.

No. 4,724.—STATE EX REL. JOHN COUGHLIN, RESPONDENT,
v. MAYOR OF THE CITY OF BUTTE, APPELLANT.

Appeal from District Court, Silver Bow County.

Decided September 14, 1920.

PER CURIAM.—Upon motion of the appellant, the appeal herein is this day dismissed.

Mr. R. L. Clinton, Mr. E. D. Elderkin and Mr. C. F. Juttner, for Appellant.

No. 4,723.—STATE EX REL. LEONARD C. COURTNEY, RESPONDENT, v. MAYOR OF THE CITY OF BUTTE, APPELLANT.

Appeal from District Court, Silver Bow County.

Decided September 14, 1920.

PER CURIAM.—Upon motion of the appellant herein, the appeal in the above-entitled cause is dismissed.

Mr. R. L. Clinton, Mr. E. D. Elderkin and Mr. C. F. Juttner, for Appellant.

No. 4,197.—STATE EX REL. CHAS. A. RUSSELL, RESPONDENT, v. JOHN F. MCKAY, CLERK, APPELLANT.

Appeal from District Court, Sanders County; Asa L. Duncan, Judge.

Decided September 20, 1920.

PER CURIAM.—Upon motion of appellant, the appeal herein is dismissed.

Mr. Wade B. Parks and Mr. S. C. Ford, Attorney General, for Appellant.

Messrs. McCormick & Russell, for Respondent.

No. 3,884.—HELENA ADJUSTMENT CO., RESPONDENT, v. ANNA E. NETT, APPELLANT.

Appeal from District Court, Lewis and Clark County; John A. Matthews, Judge Presiding.

Decided September 23, 1920.

PER CURIAM.—Pursuant to praecipe, the appeal in the above-entitled cause is dismissed.

Mr. W. D. Rankin, for Appellant.

Mr. H. S. Hepner and Messrs. Galen & Mettler, for Respondent.

Nos. 4,207, 4,211.—STATE, RESPONDENT, v. LEWIS DOWNS, APPELLANT.

Appeals from District Court, Yellowstone County; A. C. Spencer, Judge.

Decided September 24, 1920.

PER CURIAM.—These causes coming on for hearing this day, and evidence showing settlement in the court below hav-

ing been filed in this court, the appeals in said causes are dismissed.

Messrs. Morris & Hartwell and Messrs. Grimstad & Brown,
for Appellant.

Mr. James L. Davis, Mr. E. C. Collins and Mr. S. C. Ford,
Attorney General, for Respondent.

No. 4,681.—STATE EX REL. FRANK C. LAVIGNE, RELATOR, v. DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, RESPONDENT.

Original application for Writ of Prohibition.

Decided September 28, 1920.

PER CURIAM.—Pursuant to stipulation of the parties herein, the order of submission of this cause for judgment and decision is set aside and the proceeding is dismissed.

Mr. C. A. Spaulding, for Relator.

Mr. Edward Horsky, for Respondent.

No. 4,736.—STATE EX REL. J. W. RICHARDSON, RELATOR, v. C. T. STEWART, SECRETARY OF STATE, RESPONDENT.

Original application for Writ of Mandate to compel respondent to place the name of relator and others upon the official ballot to be used at the election to be held November 2, 1920.

Decided October 2, 1920.

PER CURIAM.—The application for writ of mandate to compel the respondent, as Secretary of State of the state of

Montana, to place the names of relator and others upon the official ballot to be used at the election to be held on November 2, 1920, as the candidates for the Farmer-Labor Party for the offices of presidential and vice-presidential electors, came regularly on for hearing. The motion of the attorney general to quash the alternative writ heretofore issued and to dismiss the proceeding is denied, and a peremptory writ is ordered to issue forthwith. The court is of the opinion that, since it appears that the Farmer-Labor Party was not in existence at the time the primary election was held on April 23, 1920, for presidential and vice-presidential electors, but has been organized since that time, it is now entitled to have the names of its candidates for these offices placed upon the ballot under the provisions of section 521 of the Revised Codes.

Mr. H. A. Tyvand, for Relator.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent.

No. 4,737.—STATE EX REL. CLINTON L. WILLIAMS, RELATOR, *v.* C. T. STEWART, AS SECRETARY OF STATE, RESPONDENT.

Original application for Writ of Mandamus to compel respondent to place the name of relator and others upon the official ballot to be used at the election to be held November 2, 1920.

Decided October 2, 1920.

PER CURIAM.—The application of Clinton L. Williams for writ of *mandamus* to compel the respondent, as Secretary of State of the state of Montana, to place his and the names of others upon the official ballot to be used at the election to be held November 2, 1920, as the candidates for the offices of presidential and vice-presidential electors of the Socialist

Party, came on regularly for hearing. The motion of the attorney general to quash the alternative writ heretofore issued and to dismiss the proceeding is sustained and the proceeding is ordered dismissed. The court is of the opinion that since the Socialist Party was organized and in existence at the time the primary election was held on April 23, 1920, for presidential and vice-presidential electors, and was entitled and required under the provisions of the Act initiated and passed by the people at the general election held in November, 1912 (Laws 1913, p. 590), to vote for and nominate candidates for these offices, but omitted to do so, it is not entitled now to have the names of any persons appear upon the ballot as candidates for these offices.

Mr. H. A. Tyvand, for Relator.

Mr. S. C. Ford, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent.

No. 4,257.—LIZZIE BOWMAN, RESPONDENT, *v.* DAVID KOHN, APPELLANT.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Decided October 4, 1920.

PER CURIAM.—Pursuant to stipulation of the parties herein, the appeal in the above-entitled action is dismissed without cost to either party.

Messrs. Reynolds & Shea, for Appellant.

Mr. C. R. Ingle, for Respondent.

No. 4,516.—WILLIAM M. PRICE, RESPONDENT, *v.* SMITH B. BUCKLAND, APPELLANT.

Appeal from District Court, Powell County; Geo. B. Winston, Judge.

Decided October 11, 1920.

PER CURIAM.—Pursuant to motion of appellant herein, the appeal in the above-entitled cause is dismissed.

Mr. W. E. Keeley, for Appellant.

No. 4,716.—A. C. WELDON, RESPONDENT, *v.* HERMAN SCHWANZ, APPELLANT.

Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.

Decided October 11, 1920.

PER CURIAM.—The motion of the appellant praying for the dismissal of the appeal herein is granted and the appeal is accordingly dismissed.

Mr. Robt. C. Stong, for Appellant.

Mr. Guy C. Derry, for Respondent.

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No. 4,325.—MINNIE OTTEN, APPELLANT, v. NORTHERN
PACIFIC RY. CO., RESPONDENT.

*Appeal from District Court, Lewis and Clark County; J. M.
Clements, Judge.*

Decided October 27, 1920.

PER CURIAM.—Pursuant to stipulation of counsel, the ap-
peal in the above-entitled cause is dismissed.

Mr. W. D. Rankin, for Appellant.

Messrs. Gunn, Rasch & Hall, for Respondent.

No. 4,744.—MARY L. OWENS, RESPONDENT, v. SIDNEY
MILLER, APPELLANT.

*Appeal from District Court, Gallatin County; Ben B. Law,
Judge.*

Decided November 8, 1920.

PER CURIAM.—Upon motion of respondent, the appeal
herein is this day dismissed for failure of appellant to file the
record within the time required by the rules of this court.

Mr. S. C. Ford, Attorney General, for Appellant.

Mr. Frank M. Gray, for Respondent.

**No. 4,756.—STATE EX REL. WARD HENDERSON ET AL.,
RELATORS, v. DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT, ET AL., RESPONDENTS.**

Original application for Writ of Supervisory Control.

Decided November 18, 1920.

PER CURIAM.—The application of relators herein for writ of supervisory control is, after due consideration by the court, denied.

***Mr. M. M. Duncan*, for Relators.**

**No. 4,776.—STATE EX REL. LOUIS SCKAVON ET AL., RE-
LATORS, v. DISTRICT COURT OF THE SECOND JUDI-
CIAL DISTRICT ET AL., RESPONDENTS.**

Original application for Writ of Supervisory Control.

Decided December 27, 1920.

PER CURIAM.—The application of the relators herein for a writ of supervisory control heretofore presented is denied.

***Mr. Miles J. Cavanaugh*, for Relators.**

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'ACCIDENT INSURANCE.

See Insurance, 1-8, 12-14.

ACCOUNTS STATED.

Effect of Retention Without Objection.

1. Where parties have been engaged in a course of dealings and there is an antecedent indebtedness in favor of one as against the other, and an account or bill purporting to be a statement of the account is rendered by the creditor to the debtor who retains it for an unreasonable length of time (nearly four years in the instant case) without objection, it is evidence of his assent to its correctness and constitutes an account stated, as of the date on which it was rendered.—O'Hanlon Co. v. Jess, 415.

Definition.

2. An account stated is an agreement, express or implied, that all the items therein contained are correct; it has the force of a contract, the consideration of which is the original amount.—O'Hanlon Co. v. Jess, 415.

Cause of Action.

3. In an action on an account stated, the cause of action is the contract created as above (par. 2), and plaintiff must recover upon it and not upon the original account.—O'Hanlon Co. v. Jess, 415.

Statute of Limitations.

4. Where, at the time an account was stated, the statute of limitations had not intervened against the items contained in the original account, the statement created a new cause of action against which the statute commenced to run only from the date of its rendition.—O'Hanlon Co. v. Jess, 415.

ADMISSIONS.

See Pleading and Practice, 2, 9, 15; Evidence, 45.

AGENCY.

See Principal and Agent.

AMENDMENTS.

Failure to amend pleading—Variance—Nonsuit proper,—see Nonsuit, 1.

To conform to proof—Discretion,—see Pleading and Practice, 35.

When complaint deemed amended to conform to proof,—see Appeal and Error, 7.

APPEAL AND ERROR.

Failure to file briefs within time,—see Briefs, 1, 2.

Record in contempt proceedings,—see Contempt.

Jurisdiction of district court on appeal from justice's court,—see Jurisdiction, 3, 4.

Harmless and Harmful Error—How Determinable.

1. No judgment will be reversed for technical errors or defects appearing in the record which do not affect the substantial rights of the complaining party, the question whether the particular error shall be classed as harmful or harmless depending upon the peculiar facts and circumstances in the particular case under review.—*State v. Diedtman*, 13.

Workmen's Compensation—Findings of District Court—When Conclusive.

2. On appeal from an award made under the Compensation Act, after review by the district court, the supreme court will not reverse the findings of that court unless the evidence clearly preponderates against them.—*Willis v. Pilot Butte Min. Co.*, 26.

Briefs—Failure to Discuss Error.

3. Error not discussed in the brief of appellant is not entitled to review on appeal.—*National Cash Register Co. v. Wall*, 60.

Pleading — Complaint — Anticipating Defense — Admissions—Refusal to Strike—Harmless Error.

4. If error was committed in refusing to strike a paragraph from plaintiff's complaint in an action for work and labor performed and goods furnished, which anticipated defendant's defense by alleging that the latter had an offset or counterclaim in a stated amount, it was rendered harmless by permission to defendant to plead a counterclaim for the same amount for which he received credit, plaintiff's allegation amounting to no more than an admission that the amount stated was due defendant.—*Smith v. Sullivan*, 77.

Judgment—Satisfaction—Moot Question—Dismissal of Appeal.

5. Where, in obedience to a judgment in *mandamus* directing the restoration of an officer of the police department, the officer is restored to his position the appeal of the city from the judgment will be dismissed.—*State ex rel. Breen v. Stodden*, 116.

Finding Unsupported by Evidence—Reversal of Judgment.

6. A judgment based upon a finding unsupported by evidence will be reversed.—*Tuttle v. Pacific Mutual Life Ins. Co.*, 121.

Complaint—When Deemed Amended to Conform to Proof.

7. Where evidence is admitted without objection on a theory not warranted by the complaint, the pleading will on appeal be deemed amended to conform to the proof.—*State ex rel. Dansie v. Nolan*, 167.

Conflict in Evidence—Judgment Conclusive.

8. Where a substantial conflict exists in the evidence, the supreme court on appeal will not reverse the judgment attacked on the ground of insufficiency of the evidence to sustain it.—*Sanborn Co. v. Powers*, 214.

Evidence—Inadmissibility—Error Cured by Admonition to Jury to Disregard It.

9. Error in admitting inadmissible evidence was cured by striking the testimony from the record with an admonition to the jury not to consider it in arriving at their verdict.—*Sanborn Co. v. Powers*, 214.

Erroneous Admission of Testimony—Harmless Error.

10. Where the trial court correctly instructed the jury on the measure of damages, error in admitting testimony that the livestock in question had been sold at a figure representing an advance

over the contract price was harmless, the witness stating in addition that the reasonable market price of the animals at place of destination was the amount realized on resale.—*Montana Livestock Co. v. Stewart*, 221.

Admission of Immaterial Evidence—Effect on Judgment.

11. Admission of concededly immaterial evidence is not sufficient to justify reversal of a judgment; such result following only for error materially affecting the appellant's rights on the merits of the case.—*Montana Livestock Co. v. Stewart*, 221.

Conflict in Evidence—Judgment—Affirmance.

12. Where the evidence is conflicting, the judgment will not be disturbed on the asserted ground of its insufficiency, especially where that court again passed upon its sufficiency on motion for new trial and overruled the motion.—*Bank of Commerce v. United States F. & G. Co.*, 236.

Judgment to be Sustained, to What Extent.

13. If under his pleading and the undisputed evidence a party is entitled to some relief, the judgment should be sustained to the extent of the relief to which he is shown to be clearly entitled.—*Degenhart v. Cartier*, 245.

Divorce—Evidence—Sufficiency—Review—Rule in Equity Cases.

14. Where, in a divorce proceeding, the trial court made no specific findings of fact but rendered a general decree in favor of plaintiff to the effect that all three charges alleged in her complaint were true, and the evidence was sufficient to sustain the court's view as to one of such charges, the supreme court will not interfere on appeal, even though as to the other two the proof could properly be said to preponderate against its decision.—*Lagier v. Lagier*, 267.

Same—Remarriage—Effect—Jurisdiction of Supreme Court.

15. Since the supreme court has no original jurisdiction in divorce proceedings, it cannot reverse a decree in such a case on the ground that after its rendition, and before defendant had perfected his appeal, plaintiff had remarried,—a fact, made to appear by stipulation on appeal, the legal effect of which could not have been before the trial court when it rendered its decree.—*Lagier v. Lagier*, 267.

Same—"Default"—Refusal to Set Aside—When not Error.

16. Refusal to set aside an order directing default of plaintiff in a divorce proceeding to be entered for failure to be personally present on day of hearing, issues having been joined and her counsel being present, was not error, since it could not adversely affect any substantial right of plaintiff.—*Sell v. Sell*, 329.

Drains—"Review" on Appeal—Definition.

17. The term "review" as used in the Drainage Act (Chap. 147, Laws of 1915) giving the reviewing board power to review all assessments and correct errors therein, etc., means review on appeal taken as provided by the Act, by a party deeming himself aggrieved.—*State ex rel. First Nat. Bank of Molt v. Heath*, 337.

Trial by Court—Immaterial Evidence—Presumptions.

18. Where the trial judge in an action tried without a jury stated to counsel that in rendering his decision he would disregard all evidence objected to as immaterial if he found it to be so, it will be presumed on appeal that he did so, and hence that appellant suffered no prejudice.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

New Trial—Conflict in Evidence—Affirmance of Judgment.

19. An order denying a motion for new trial will not be reversed where the verdict of the jury and judgment of the court are based on substantially conflicting evidence.—*Zalac v. Barich*, 428.

Criminal Law—Information—Demurrer Sustained—Record on Appeal by State.

20. Where the state appeals from an order sustaining a demurrer to an information, it must present the information, with the demurrer and the trial court's ruling thereon, in a bill of exceptions duly settled and allowed, under the mandatory provisions of section 9347, Revised Codes, else the supreme court is without jurisdiction to entertain the appeal.—*State v. Libby Yards Co.*, 444.

Complaint—Deemed Amended to Admit Proof—When Rule not Applicable.

21. The rule that where evidence was introduced at the trial of a cause without objection the complaint will, on appeal, be deemed amended to admit the evidence if necessary to sustain the judgment, applies only to a case in which the objection to the sufficiency of the complaint is raised for the first time in the supreme court, and not to one where the complaint had been attacked by general demurrer and an exception saved to an adverse ruling.—*Ecclesine v. Great Northern Ry. Co.*, 470.

Gaming—Hearsay Testimony—Inadmissibility—Curing Error.

22. Error committed in permitting an officer to testify to a conversation had with one D., charged jointly with defendant for gambling but not on trial with him, relative to defendant's intention to open a gambling-room, without anything to show a conspiracy between defendant and D., held to have been cured by subsequent testimony of D. that defendant had told him that he intended to open such a room.—*State v. Teubner*, 482.

Law of Case.

23. The principles announced by the supreme court in annulling on *certiorari* the unauthorized entry of judgment in an equity case were the law of the case on a subsequent appeal from a judgment dismissing the action for failure to have judgment entered within the six-months period prescribed by section 6714, subdivision 6, of the Revised Codes.—*Security Trust & Savings Bank v. Reser*, 501.

Temporary Injunction—Motion to Dissolve—Theory of Case.

24. Where plaintiffs asked for the dissolution of a temporary injunction on the ground that they were and defendant was not entitled to possession of the lands in controversy and assumed the burden of showing that they were entitled to the injunction, they could not on appeal change their theory and urge that the trial court erred in not modifying and continuing it in force as to the lands held by plaintiff under an alleged lease.—*Blinn v. Hutterische Society*, 542.

Same—Motion to Dissolve—Assumption of Burden of Proof—Failure to Sustain Burden—Theory of Case.

25. Where plaintiffs, on the hearing of defendant's motion to dissolve a temporary restraining order, voluntarily assumed the burden of showing that they were the owners in fee of lands, the crops growing on which defendant claimed under an alleged lease, and that therefore they were entitled to the injunction, they were responsible for uncertainty in the evidence respecting the issue, and in no position to urge on appeal that the injunction should have been modified instead of dissolved.—*Blinn v. Hutterische Society*, 542.

Verdict—Evidence—Sufficiency.

26. A verdict based upon evidence which from any point of view could have been accepted as credible by the jury is binding upon the supreme court even though to it it may appear inherently weak.—*Williams v. Thomas*, 576.

Theory of Case.

27. The issue of inadequacy of consideration, though improperly joined with the defense of latent defects in the property which was the subject of a suit for specific performance, having been tried as though properly before the court, appellant was estopped to urge on appeal that the issue was not properly raised by the pleadings.—*Babcock v. Engel*, 597.

Evidence—Findings—When not Conclusive.

28. *Held*, that the rule under which the supreme court will not reverse the findings of the district court except where the evidence clearly preponderates against them does not obtain where the findings were made by the district court upon the same record presented for review on appeal, since then the appellate court is in as advantageous a position to determine their correctness as was the trial court in making them.—*Morgan v. Butte Central Min. Co.*, 633.

Criminal Law—Record—Errors Reviewable.

29. Under section 9416, Revised Codes, defendant, on appeal from the judgment of conviction, may, by bill of exceptions, bring before the court errors in the decision of questions of law arising during the course of the trial, exclusive of those embraced within the provisions of the statute providing for new trials.—*State v. Francis*, 659.

Failure to File Transcript on Appeal—Dismissal.

30. On motion of respondent, the appeal may be dismissed for failure of appellant to file transcript within time.—*State v. Duffy*, 699; *Butte Electric Supply Co. v. Royal Indemnity Co.*, 703; *Owens v. Miller*, 711.

Moot Questions—Supreme Court will not Pass upon.

31. The supreme court will not pass upon moot questions.—*State ex rel. O'Grady v. District Court*, 695.

APPEARANCE.

Motion challenging jurisdiction—Effect,—see *Pleading and Practice*, 21.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Status of Assignee.

1. An assignee for the benefit of creditors stands in the place of the assignor.—*Acme Harvesting Machine Co. v. Benedict*, 110.

Right of Creditor to Sue Assignor.

2. As at common law, so under the Revised Codes (secs. 6136–6161), the execution of an assignment for the benefit of creditors is no bar to an action by a creditor against the assignor, and in no way affects the right of the creditor to proceed to judgment after the assignment is made.—*Acme Harvesting Machine Co. v. Benedict*, 110.

Assignment Does not Discharge Debt.

3. An assignment, though made with consent of the creditors, does not effect the release of the assignor of any portion of his

obligations not discharged by his assignee.—*Acme Harvesting Machine Co. v. Benedict*, 110.

Release of Creditor—Receipt—Insufficiency.

4. *Held*, that nothing short of an agreement expressing in clear terms the creditor's intention to accept the *pro rata* distribution of the assets in the hands of the assignee as a full discharge of the debt due him absolves the debtor, and that a receipt stating that the amount received by the creditor constituted the final dividend upon his account, "which account is hereby settled and closed, and the assignee is released from his trust, and finally discharged from his duties and obligations as such assignee," was not such an agreement.—*Acme Harvesting Machine Co. v. Benedict*, 110.

ATTACHMENT.

Sheriffs—Wrongful Attachment—Liability.

1. A sheriff who wrongfully seizes personal property under a writ of attachment may be sued therefor in any appropriate form of action the person whose rights have been invaded may choose to pursue.—*Bank of Commerce v. United States F. & G. Co.*, 236.

Same—Wrongful Attachment—Sales—Statute of Frauds—Immediate Delivery—Continued Change of Possession—Official Bond—Suretyship.

2. In an action against a surety company to recover upon the official bond of a sheriff for his failure to return personal property or pay its value, in obedience to a judgment in an action in claim and delivery for the wrongful seizure thereof under a writ of attachment, evidence *held* sufficient to warrant the judgment in the action in replevin, the effect of which was that the attached property had been sold to plaintiff in good faith, prior to its sequestration by attachment, the sale being accompanied by an immediate delivery and continued change of possession.—*Bank of Commerce v. United States F. & G. Co.*, 236.

Chattel Mortgages—Attaching Creditors—Deposit—Wrongful Satisfaction of Mortgage—Damages.

3. Evidence in an action by an attaching creditor to recover the amount of the deposit made by him at the time he attached mortgaged chattels, on the alleged ground that his right of recoupment against the attached property had been destroyed by the wrongful act of the mortgagee, after payment of the deposit to him, in certifying of record that the mortgage had been fully satisfied and discharged, thus causing the property to be subsequently sold to an innocent purchaser, *held* to show that the purchaser was not an innocent one, that the loss sustained by plaintiff was due to his own relinquishment of his lien, and not to the wrongful act of defendant, and that the latter was therefore not liable.—*Degenhart v. Cartier*, 245.

Hail Insurance Policies—Not Contracts for Direct Payment of Money.

4. *Held*, that an action to recover damages, unliquidated in character, under hail insurance policies, under one of which a total loss of crops was asserted and under the others of which only partial losses were alleged, was not one upon contracts for the direct payment of money, within the meaning of section 6656, Revised Codes, and that therefore an attachment issued at the commencement of the action was properly dissolved.—*Carter v. Bankers' Ins. Co.*, 319.

ATTORNEY AND CLIENT.

See, also, Contempt, 3-13.

Authority of Attorney to Appear—Want of Authority—Dismissal of Action.

1. The district court may, under section 6423, Revised Codes, on motion of either side made in good faith and upon a showing supported by affidavit or otherwise, require the attorney of the adverse party to produce and prove the authority under which he appears, and if it be shown that the attorney for plaintiff has no such authority, dismiss the action.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Same—Presumptions.

2. An attorney is presumed to have authority to appear for the party he assumes to represent, until the contrary is shown.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Challenging Authority of Attorney to Act—Time.

3. *Semble*: While the statute does not declare when a motion of the character of the above must be made, it would seem that it should be made whenever during the progress of the case the party desiring to present the question comes into possession of facts furnishing a reasonable ground for the belief that the attorney for the adversary party is acting without authority.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Same—Waiver.

4. Where defendant desires to make a motion calling upon plaintiff's attorney to show by what right he appears in the cause, he should make it upon his first appearance or at the earliest time he can make it, otherwise he will be deemed to have waived his right to make it.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Motion Challenging Attorney's Authority—Jurisdiction.

5. Since the word "jurisdiction" as used in section 6719, Rev. Codes, means the power of the district court to hear and determine a cause, which power ceases when it is shown that the action was brought without authority, a motion of defendant challenging the right of the attorney for plaintiff to appear is, in effect, one advising the court that it has not properly acquired the power to hear and determine, and therefore one challenging jurisdiction.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Fees—Evidence—Admissibility.

6. In an action to recover attorney's fees, admission in evidence of the *remittitur* from the supreme court in a cause in which plaintiff claimed to have rendered services after remand to the district court was proper for the purpose of showing the necessity for legal services after the case was sent back.—*Baldwin v. Silver*, 495.

Same—Account Stated—Admissibility in Evidence.

7. An account rendered to and received by defendant showing charges for legal services in a larger amount than that testified to by defendant as having been agreed upon by the parties, *held* admissible in rebuttal.—*Baldwin v. Silver*, 495.

Same—Proper Refusal of Instruction on Conversion.

8. Refusal of an instruction offered by defendant on the subject of conversion in connection with his counterclaims in an action to recover for legal services, where conversion was not charged directly in either of them, the court, treating the counterclaims

as seeking to recover for moneys had and received, having fully advised the jury as to defendant's rights in the premises, was not error.—Baldwin v. Silver, 495.

Fees—Complaint—Negative Pregnant.

9. The complaint in an action to recover attorneys' fees, which, after setting forth the rendition of the services at defendants' special instance and request and their reasonable value, alleged "that the defendants have not paid the same or any part thereof," held not open to the objection that the allegation of nonpayment was pregnant with the admission that someone other than the defendants might have paid the amount claimed before the action was begun, since there is no presumption that anyone will pay the debt of another.—Spaulding v. Lambros, 536.

Contracts—Securing Alien's Exemption from Military Service—Public Policy.

10. An agreement between an attorney and an alien who had not declared his intention to become a citizen of the United States, to establish the latter's exemption from military service under the Selective Service Act, was not void as in contravention of public policy, since, under that Act, aliens were not liable to military service during the war.—Spaulding v. Lambros, 536.

BANKRUPTCY.

Preferences—Deed—Setting Aside—Burden of Proof.

1. A trustee in bankruptcy who sought to set aside a conveyance by the bankrupt under the provisions of the Bankruptcy Act (U. S. Comp. Stat., secs. 9586-9656) has the burden of establishing by a fair preponderance of the evidence: The insolvency of the bankrupt at the time the deed was given; knowledge of insolvency by transferee sufficient to put a reasonably prudent person upon inquiry; and the existence of other creditors of the same class against whom the conveyance would operate unequally by allotting to them a lesser percentage on their debt than the defendant would receive by reason of the transfer.—Worden, Trustee, v. Morigeau, 64.

Insolvency—What may not Constitute.

2. Financial embarrassment does not necessarily amount to insolvency.—Worden v. Morigeau, 64.

Same—Suspicious Insufficient.

3. Something more than suspicion that his grantor is insolvent is necessary to put a grantee upon inquiry at the peril of being adjudged to have received a preference.—Worden v. Morigeau, 64.

Preferences—Evidence—Insufficiency.

4. In a suit by a trustee in bankruptcy to set aside as a preference a conveyance by the bankrupt to his brother, an Indian, in consideration of a pre-existing debt, evidence held sufficient to sustain the *bona fides* of the transfer.—Worden v. Morigeau, 64.

BANKS AND BANKING.

Checks—Varying Terms of Writings.

1. After a check given in part payment is accepted, it supersedes oral negotiations of the parties to the contract with reference to the payment, and testimony of purported statements concerning it by the maker either before or after its return by the bank to which it was presented for payment but upon which it was not

drawn was inadmissible as an attempt to vary the terms of a written instrument.—*Montana Livestock & Loan Co. v. Stewart*, 221.

Same—What Constitutes Dishonor.

2. Inquiry by telephone of a bank upon which the buyer of livestock had drawn a check in part payment, whether it would guarantee the check and the bank's refusal, coupled with a statement by the cashier of his opinion that it would be paid when presented, did not amount to a dishonor of the check nor justify the seller in his refusal to carry out the contract, since a check can only be dishonored by presentment either directly to the bank on which it is drawn or through another bank in which it is deposited for collection.—*Montana Livestock & Loan Co. v. Stewart*, 221.

Same—Dishonor—Correct Instruction.

3. An instruction that a contract for sale could not be avoided or rescinded for nonpayment of a check given in part payment without presentment of the check to the bank on which it was drawn and refusal of payment was not open to the objection that it advised the jury that the check must be presented to the bank in person.—*Montana Livestock & Loan Co. v. Stewart*, 221.

BILLS OF SALE.

Bill of Sale not Necessary to Validity.

1. A bill of sale is not necessary to make a valid sale of personalty.—*Lewis v. Lambros*, 555.

BONDS.

Official—Liability of sureties,—see Notaries Public, 1-3.

Funding bonds—Validity,—see Cities and Towns, 29, 30.

Validity,—see Cities and Towns, 11-16.

BOUNDARIES.

Parol Agreements—Validity—Statute of Frauds.

1. An oral agreement between coterminous owners establishing a boundary line between their respective lands is not within the statute of frauds as conveying the fee, where at the time of entering into it they were in doubt or ignorance of the true line and a real controversy as to it existed between them.—*Box Elder Livestock Co. v. Glynn*, 561.

Public Lands—Parol Agreement Between Entryman Before Patent—Effect.

2. An agreement of the nature of the above between an entryman upon public lands before patent and an adjoining owner was binding upon the former and those claiming under him.—*Box Elder Livestock Co. v. Glynn*, 561.

Offer of Proof—Improper Rejection.

3. An offer of proof, in an action in ejectment, tending to show not only a parol agreement fixing a boundary line between an entryman before patent and an adjoining owner, but also ratification thereof by the entryman's successor in interest and defendant after final proof and both before and after patent, held to have been improperly rejected.—*Box Elder Livestock Co. v. Glynn*, 561.

BRIEFS.

Appeal—Failure to File Briefs—Affirmance of Judgment.

1. Where no briefs have been filed on appeal, the judgment will be affirmed.—State ex rel. Larson v. Wyman, 607.

Same—Dismissal of Appeal.

2. For failure of appellant to file brief within time, the appeal may be dismissed.—State v. Koble, 702; Lux v. Smith, 703.

BURDEN OF PROOF.

In action by trustee in bankruptcy to set aside deed,—see Bankruptcy, 1.

In action on accident insurance policy,—see Insurance, 6, 10, 13.

In action on official bond of notary public,—see Notaries Public, 2.

In action to quiet title,—see Quieting Title, 1.

In action for specific performance—Defenses of intoxication and inadequacy of consideration,—see Specific Performance, 6.

In action for malicious prosecution,—see Malicious Prosecution, 5.

In action to secure cancellation of contract,—see Contracts, 29, 30.

In action for malpractice,—see Physicians and Surgeons, 17.

In prosecution for murder,—see Criminal Law, 27, 28.

On motion to dissolve injunction—Theory of case,—see Appeal and Error, 25.

CANCELLATION OF INSTRUMENTS.

Undue influence,—see Contracts, 28–32.

CAUSES OF ACTION.

In action on account stated,—see Accounts Stated, 3.

Joinder—Effect on right to change of venue,—see Change of Venue, 4.

Splitting—Motion to separately state and number,—see Pleading and Practice, 2.

CERTIORARI.

See, also, Contempt, 1.

Scope of Writ.

1. *Certiorari* lies only to determine whether a tribunal exercising judicial functions has exceeded its jurisdiction or authority.—State ex rel. Examining and Trial Board v. Jackson, 90.

Insufficiency of Affidavit—Motion to Quash Proper.

2. Though the Codes make no provision for a motion to quash a writ of *certiorari* for insufficiency of the affidavit filed in support of the application, the motion is a proper method for testing the sufficiency of the pleading.—State ex rel. Examining and Trial Board v. Jackson, 90.

Metropolitan Police Law—Examining and Trial Board—Removal of Officer.

3. *Certiorari* lies to review the action of the examining and trial board of the police department of a city in discharging an officer under the provisions of the Metropolitan Police Law, if the complaint on which he was tried did not state facts sufficient to constitute the offense with which he was charged, or, the complaint being sufficient, if there was no substantial evidence tending to

prove the charges.—State ex rel. Examining and Trial Board v. Jackson, 90.

Same—Trial of Officer—Record of Testimony.

4. Since the examining and trial board of the police department of a city is not, under the Metropolitan Police Law, required to make or keep a record of the testimony produced before it on the trial of an officer charged with misconduct, the district court was without authority to command it, on *certiorari*, to return *inter alia* a transcript thereof to aid in determining whether the evidence was sufficient to warrant an order of removal.—State ex rel. Examining and Trial Board v. Jackson, 90.

Same—Removal of Officer—Insufficiency of Evidence.

5. *Certiorari* held ineffectual for the purpose of determining whether an examining and trial board of a city police department exceeded its jurisdiction in that it removed an officer on insufficient evidence, since the board is not required to make or keep a record of the testimony produced before it and therefore cannot be compelled, under the writ, to make return thereof.—State ex rel. Examining and Trial Board v. Jackson, 90.

Contempt—Remedies of Contemnor.

6. One adjudged guilty of a contempt of court may have the proceedings reviewed on application for writ of *certiorari* or supervisory control.—State ex rel. Rankin v. District Court, 276.

Does not Lie, When.

7. Where appeal is available, *certiorari* does not lie even though the remedy by appeal may not be adequate.—State ex rel. Chicago etc. Ry. Co. v. Gibb, 518.

Justices Courts—Appeal—Default Judgment—Lack of Jurisdiction.

8. A justice of the peace on April 5, the day set for trial of a civil action, continued the cause "for the present"; he later fixed the day for hearing the case for June 2, and, being out of the city on that day, continued it to June 16, when, defendant not appearing within one hour, he entered judgment by default. *Held*, that by failing to comply with the provisions of sections 7033–7037, Revised Codes, relating to time of trial and postponements in justices' courts, he was without jurisdiction to enter judgment, and that the district court on *certiorari* properly annulled it.—State ex rel. Chicago etc. Ry. Co. v. Gibb, 518.

CHECKS.

See Banks and Banking, 1–3.

CHANGE OF VENUE.

District Judges—Disqualification for Imputed Bias—Statutes.

1. Section 6315, Revised Codes, as amended by Laws of 1909, Chapter 114, relative to the disqualification of a district judge for imputed bias, and sections 6506 and 6507, relative to change of venue after such disqualification has been effected, are companion measures and must be construed together.—State ex rel. Wooster v. District Court, 50.

Duty of Judge in District Having Two or More Judges.

2. *Held*, on *certiorari*, that where an affidavit of disqualification for imputed bias was filed in a district having three judges, it was the duty of the judge to call in another judge of his district to preside, and that he had no power to grant a change of venue until

he had done so, and the called-in judge had failed to appear and assume jurisdiction for thirty days after the motion was made.—State ex rel. Wooster v. District Court, 50.

Record.

3. When a judge against whom an affidavit of disqualification for imputed bias has been filed grants an order changing the venue, an order, reciting that another judge had been called in and had failed for thirty days after filing of the motion to appear and assume jurisdiction should be made and entered of record to the end that the proceedings may be subject to review.—State ex rel. Wooster v. District Court, 50.

Joinder of Causes of Action—Effect on Right to Change.

4. Where the complaint in an action in tort set forth two causes of action, one of which was properly triable in the county in which it was commenced, defendants' right to a change of venue as to the other was not abridged by plaintiffs' joining the two.—Woodward v. Melton, 594.

When Venue cannot be Changed.

5. If an action in tort was properly brought in the county in which it was committed, the venue cannot be changed, over plaintiff's objection, upon the ground of defendant's residence in an adjoining county where he was served with summons.—Woodward v. Melton, 594.

Complaint—Sufficiency—Inferences.

6. *Held*, that the complaint alleging that plaintiffs were engaged in business in M. county, breeding, raising, etc., sheep, "and for that purpose and to that end" had leased certain lands, describing them by government subdivisions, all in a certain township and range, and that defendants wrongfully grazed their sheep affected with contagious and infectious disease, on and over "the said lands of plaintiffs," etc., was sufficient to show that the lands were in M. county and that the wrong was committed and triable therein. Woodward v. Melton, 594.

CHATTEL MORTGAGES.

See Mortgages.

CIRCUMSTANTIAL EVIDENCE.

See Criminal Law, 35, 37; Evidence, 9, 10.

CITIES AND TOWNS.

City Officers—Persons "Beneficially Interested."

1. *Held*, that the mayor of a city and the members of the examining and trial board of its police department as such were "beneficially interested," within the meaning of section 7228, Revised Codes, in their application for a writ of prohibition to stay *certiorari* proceedings instituted by a discharged police officer to review the board's action, which latter writ commanded relators, among other things, to return to the district court a transcript of the testimony introduced before them, which they claimed to be unable to do.—State ex rel. Examining and Trial Board v. Jackson, 90.

Metropolitan Police Law—Examining and Trial Board—Removal of Officer—*Certiorari*.

2. *Certiorari* lies to review the action of the examining and trial board of the police department of a city in discharging an officer under the provisions of the Metropolitan Police Law, if the complaint on which he was tried did not state facts sufficient to constitute the offense with which he was charged, or, the complaint being sufficient, if there was no substantial evidence tending to prove the charges.—State ex rel. Examining and Trial Board v. Jackson, 90.

Same—*Certiorari*—Insufficiency of Petition—Conclusions.

3. Where the application of a discharged police officer for writ of *certiorari* running to the examining and trial board contained neither a copy of the complaint in support of his assertion that it was insufficient nor a *résumé* of the testimony to show failure of proof, and his affidavit stated only legal conclusions, the court was without jurisdiction to issue the writ.—State ex rel. Examining and Trial Board v. Jackson, 90.

Same—Trial of Officer—Record of Testimony—*Certiorari*.

4. Since the examining and trial board of the police department of a city is not, under the Metropolitan Police Law, required to make or keep a record of the testimony produced before it on the trial of an officer charged with misconduct, the district court was without authority to command it, on *certiorari*, to return *inter alia* a transcript thereof to aid in determining whether the evidence was sufficient to warrant an order of removal.—State ex rel. Examining and Trial Board v. Jackson, 90.

Same—Removal of Officer—Insufficiency of Evidence—*Certiorari*.

5. *Certiorari* held ineffectual for the purpose of determining whether an examining and trial board of a city police department exceeded its jurisdiction in that it removed an officer on insufficient evidence, since the board is not required to make or keep a record of the testimony produced before it and therefore cannot be compelled, under the writ, to make return thereof.—State ex rel. Examining and Trial Board v. Jackson, 90.

Same—Remedy of Officer Dismissed by Examining and Trial Board.

6. *Semble*: It would seem that the remedy available to a police officer dismissed from the force by the examining and trial board of the department, after trial, on alleged insufficient evidence, is an independent suit in equity to set aside its order on the ground that its findings on which the order was based was not supported by the proof.—State ex rel. Examining and Trial Board v. Jackson, 90.

Judgments—Satisfaction—Dismissal of Appeal.

7. Where, in obedience to a judgment in *mandamus* directing the restoration of an officer of the police department, the officer is restored to his position the appeal of the city from the judgment will be dismissed.—State ex rel. Breen v. Stodden, 116.

Metropolitan Police Law—Removal of Officer—Restoration—Ratification.

8. *Quaere*: Where a city attorney, without authority so to do, ordered the restoration of a member of the police force, did the mayor by signing salary warrants of the officer thereafter, pending appeal from a judgment in *mandamus* ordering restoration, ratify the restoration?—State ex rel. Breen v. Stodden, 116.

Same—Retirement of Officers—Power of Council.

9. Though, under the Metropolitan Police Law, members of the police department in a city cannot be dismissed except for cause and after a hearing or trial, the city council has authority to retire a member or any number of members of the department to the eligible list on a determination in good faith that their services are not required.—State ex rel. Breen v. Stodden, 116.

Same—Removal of Officer on Ground of Economy and Appointment of Another Illegal.

10. Where, under the provisions of the Metropolitan Police Law, a city council had by ordinance created the offices of city jailer and two assistant jailers and did not thereafter vacate any one of these offices, it had no power, after retiring one of such assistants and placing him on the eligible list on the ground of retrenchment, to continue the office in operation and put another in charge of it.—State ex rel. Breen v. Stodden, 116.

Water Supply—Constitutional Limit—Indebtedness—Validity of Bonds.

11. A city cannot lawfully authorize a bond issue beyond the constitutional three per cent limit for the purpose of improving its water supply, if there is a sufficient margin within that limit to secure the needed funds; but if the council either purposely or through inadvertence declares it necessary to increase the city's indebtedness beyond the limit, when in fact the necessity does not exist, the bonds authorized by a favorable vote of the electors are nevertheless valid city obligations unless the vote was procured or influenced by the deception of the voters to their prejudice.—Edwards v. City of Helena, 292.

Same—Bonds and Interest—How Payable.

12. Where a contemplated city bond issue is beyond the three per cent limit and is authorized by section 6, Article XIII, of the Constitution, the revenues of its water plant are irrevocably set aside for the discharge of the principal and interest, and a taxpayer who is not a water user cannot be called upon to contribute unless the revenues of the plant are insufficient, in which event only a property tax may be levied to supply the deficiency.—Edwards v. City of Helena, 292.

Same.

13. Where the three per cent margin of a city's indebtedness is sufficient to admit of a contemplated bond issue of the nature of the above, the bonds become the ordinary obligations of the city to be redeemed by funds derived from direct taxes upon property within its limits, unless other provisions are made for the payment of principal and interest.—Edwards v. City of Helena, 292.

Same—Disposition of Revenues.

14. If the revenues from a city owned water plant purchased by funds derived from a sale of bonds issued beyond the three per cent limit of indebtedness exceed the amount necessary to discharge the indebtedness as it falls due, such excess is subject to disposition by the city council as other public revenues, and may be used to meet a new indebtedness created by an additional bond issue for the improvement of the system.—Edwards v. City of Helena, 292.

Same—Injunction—Taxpayer's Suit—When Dismissal Proper.

15. Where the situation of plaintiff taxpayer, in an action to enjoin the issuance and sale of municipal bonds for water supply purposes on the ground that the contemplated increase in the

city's indebtedness was unauthorized because it still had a borrowing capacity within the constitutional three per cent limit, rendering the council's action in classifying the bonds as falling without the limit unnecessary, was no different from what it would have been had the council made the correct declaration in the ordinance calling a special election, he was not injured, and judgment on dismissal was proper.—*Edwards v. City of Helena*, 292.

Ordinances—When Irrepealable.

16. An ordinance contractual in its nature, as is one in which it is agreed that if additional indebtedness in the shape of bonds should be authorized at a special election to provide for improving the city's water supply, the revenues derived from the plant would be devoted to the discharge of the indebtedness and resort to direct taxation would be had only in the event they should prove insufficient, and then only to meet the deficit, cannot, in the absence of a provision therein reserving the right of repeal, be repealed without the consent of the other party until the bonds and interest thereon are fully discharged.—*Edwards v. City of Helena*, 292.

Taxation—Special Improvement Districts—Estoppel.

17. Failure of an owner of town property to make protest to the creation of a special improvement district comprising an area of 14,000 square feet did not estop him from thereafter complaining of the inclusion of an additional area of equal extent made without his knowledge or consent, and of the proportionate increase in his tax.—*Pool v. Town of Townsend*, 297.

Same—When Tax Void *Ab Initio*.

18. A special improvement tax on an addition to a town not within its limits at the time the district was created is void *ab initio*.—*Pool v. Town of Townsend*, 297.

Additions—How Accomplished—Common Law.

19. Since the Codes provide the means whereby an addition may become a part of a city or town, the means so provided are exclusive, and the method by which the same result might be reached under the common law has no application.—*Pool v. Town of Townsend*, 297.

Same—Filing of Plat not Alone Sufficient.

20. The approval of the mayor and council of a city or town is, under section 3212 of the Revised Codes, essential to bring it within the jurisdiction of the council, the filing of the map alone being insufficient.—*Pool v. Town of Townsend*, 297.

Taxation—Injunction—Judgment Too Broad, When.

21. Where only a portion of a special improvement tax was illegal because imposed upon land not within the town limits at the time the district was created, a judgment enjoining the collection of the entire tax, part of which was on property properly included in the district and therefore justly due, was too broad; judgment therefore modified to apply to only that portion illegally imposed.—*Pool v. Town of Townsend*, 297.

Special Improvement Districts—Resolution of Intention—Jurisdiction.

22. A resolution of intention, in due form and properly adopted, is the basis for subsequent proceedings looking to the creation of a special improvement district; without it, passed substantially

as the statute requires, municipal authorities are without jurisdiction to make the contemplated improvement.—*Hinzeman v. City of Deer Lodge*, 369.

Same—Resolution of Intention—Absence of Approval by Mayor—Effect.

23. *Held*, under section 3265, Revised Codes, that a resolution of intention not approved by the mayor until seventeen days after its publication, was not duly “passed,” that its publication was therefore premature and amounted to no publication, rendering all subsequent proceedings thereunder void.—*Hinzeman v. City of Deer Lodge*, 369.

Riots—Statutory Liability—Purpose of Statute.

24. The purpose of section 3485, Revised Codes, making cities and towns responsible for injuries to real or personal property within their corporate limits, caused by mobs or riots, is not only to create municipal liability, but to instill in the minds of tax payers a will to discourage violence and to stimulate effort to preserve public safety.—*Butte Miners’ Union v. City of Butte*, 391.

Same—Damages—Absolute Liability—Exception.

25. *Held*, under section 3485, Revised Codes, that the liability of a city for damages to property through riots or mobs is absolute, save where the plaintiff owner by his own unlawful conduct induced the injury for which he seeks damages, in which event he cannot recover, since no one can take advantage of his own wrong.—*Butte Miners’ Union v. City of Butte*, 391.

Same—Storing Arms in Building Destroyed—Defenses.

26. The bare fact that plaintiff labor union had stored arms and ammunition in its building to protect its property and the lives of its members there assembled was not alone sufficient to defeat its right to recover damages under section 3485, Revised Codes, since under the provisions of the state Constitution, the right to protect property and to bear arms in defense of person and property is guaranteed (Art. III, secs. 3, 13).—*Butte Miners’ Union v. City of Butte*, 391.

Same—Instructions.

27. In an action against a city for damages to its property during a riot, in which the defenses alleged were that, though knowing of the danger incident to holding a parade on a certain day, it nevertheless did hold it and failed to advise defendant of its fears in that regard, and that plaintiff had caused firearms and ammunition to be stored in its building and that but for the fact that a shot was fired therefrom, which enraged the mob, the injury complained of would not have resulted, an instruction that if plaintiff by “want of ordinary care” or by its own “voluntary acts” contributed to the injury, it could not recover, *held* erroneous as inapplicable under the issues, and because faulty for failure to define the terms “want of ordinary care” and “voluntary acts.”—*Butte Miners’ Union v. City of Butte*, 391.

Government—Primary Purpose.

28. The primary purpose of government is maintenance of peace and social order.—*Butte Miners’ Union v. City of Butte*, 391.

Floating Indebtedness—Power to Issue Funding Bonds—Submission to Voters not Necessary.

29. Under sections 3461 and 3462, Revised Codes, a city may, through its council, issue bonds for the purpose of funding its

floating indebtedness, without submitting the matter to a vote of the taxpayers.—*Parker v. City of Butte*, 531.

Funding Bonds—Power of Legislature.

30. The legislature has power to grant cities and towns authority to fund their floating indebtedness.—*Parker v. City of Butte*, 531.

CLAIM AND DELIVERY.

See Mortgages, 6.

COMMON LAW.

Action for jactitation of marriage does not lie,—see Husband and Wife, 9.

Same—Cities and Towns—Additions—How Established.

1. Since the Codes provide the means whereby an addition may become a part of a city or town, the means so provided are exclusive, and the method by which the same result might be reached under the common law has no application.—*Pool v. Town of Townsend*, 297.

CONCLUSIONS.

See Pleading and Practice, 4.

CONSIDERATION.

Forbearance to foreclose mortgage,—see Contracts, 33.

Inadequacy,—see Specific Performance, 4, 6.

CONSTITUTION.

Bond issues—Constitutional limit,—see Cities and Towns, 11–13.

States—Power to Engage in Business of Operating Grain Elevators.

1. It not being prohibited from doing so by the Constitution, the state may, under its police power, lawfully engage in the business of operating a grain elevator or in other similar business for the benefit of the public.—*State ex rel. Lyman v. Stewart*, 1.

Same—Statutes—Terminal Grain Elevators—Constitution—Uniformity Clause.

2. *Held*, that Chapter 150, Laws of 1919, requiring a levy of a tax upon lands "agricultural in character" for the purpose of bond issues for the construction of terminal elevators, does not violate the uniformity clause of the Constitution.—*State ex rel. Lyman v. Stewart*, 1. (Overruled in *Stoner v. Timmons*, 59 Mont. —.)

Statutes—Constitutionality—Rule for Determining.

3. The constitutionality of a statute will be upheld unless it appears beyond a reasonable doubt that the Act is unconstitutional.—*State ex rel. Lyman v. Stewart*, 1.

Workmen's Compensation Act—Appeal to Supreme Court—Trial *De Novo*—Unconstitutional Provision of Act.

4. To the extent that section 22(d) of the Compensation Act (Chap. 96, Laws 1915) attempts to confer jurisdiction upon the supreme court to try *de novo*, in the sense that a case appealed to the district court from a justice's court is tried anew, 'a case appealed to it from the district court and brought into that court on appeal from an award made by the Industrial Accident Board, it is invalid as violation of sections 2 and 3, Article VIII, Constitution.—*Willis v. Pilot Butte Mining Co.*, 26.

Claims Against County—Disapproval by Auditor—Powers of District Judge.

5. *Semble*: It would seem that the proviso in section 3106, Revised Codes, empowering district judges to order payment of a claim against a county after disapproval by the auditor, is repugnant to section 1 of Article IV of the Constitution in that it undertakes to cast upon district judges a power which pertains exclusively to the executive branch of the government.—*State ex rel. Dolin v. Major*, 140.

Migratory Livestock—Statute—Unconstitutionality.

6. *Held*, that section 2531, Revised Codes, which provides for the taxation of livestock brought into the state for grazing purposes and which by implication confines its operation to stock brought in after March 1 of any one year, without including all other property of the same class so brought in, is unconstitutional as violative of the uniformity rule in matters of taxation.—*Hayes v. Smith*, 306.

Cities and Towns—Riots—Storing Arms in Building Destroyed—Defenses.

7. The bare fact that plaintiff labor union had stored arms and ammunition in its building to protect its property and the lives of its members there assembled was not alone sufficient to defeat its right to recover damages under section 3485, Revised Codes, since under the provisions of the state Constitution, the right to protect property and to bear arms in defense of person and property is guaranteed (Art. III, secs. 3, 13).—*Butte Miners' Union v. City of Butte*, 391.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article	III, section 3	401
Article	III, section 13	401
Article	III, section 14	176
Article	III, section 29	34
Article	IV, section 1	151
Article	VIII, sections 2 and 3.....	34, 289
Article	X, section 1	6
Article	XII, section 1	311
Article	XII, section 11	311 <i>et seq.</i>
Article	XIII, section 2	9
Article	XIII, section 6	295
Article	XVII, section 1	7

CONTEMPT.**Supervisory Control—Extent of Review.**

1. On writ of supervisory control to review an order finding relators guilty of contempt for violation of a decree adjudicating water rights, attacked on the ground of the insufficiency of the evidence to sustain it, the supreme court can only determine whether the district court, acting within jurisdiction, had before it substantial evidence to support the order, its weight and the credibility of the witnesses being matters within the exclusive province of that court.—*State ex rel. Keiley v. District Court*, 272.

Evidence—Sufficiency.

2. *Held*, that the district court had before it substantial evidence warranting it in finding that the claim of relators that they had

developed a new supply of water having no connection with the stream for interfering with adjudicated rights in the waters of which they were adjudged guilty of contempt, was without merit. *State ex rel. Keiley v. District Court*, 272.

Attorneys—Judgment—Insufficiency.

3. *Held*, on *certiorari*, that an order adjudging an attorney guilty of a direct contempt in that he had been insulting and impudent in his remarks to the court; that, though admonished a number of times not to repeat a question to a witness, he nevertheless repeated it each time; that while the court was undertaking to make remarks, it was interrupted by contemnor; and that his manner throughout the trial had been such as to bring the court in contempt and interfere with the proper administration of justice, was insufficient to meet the requirements of section 7311, Revised Codes, which provides that the court shall set out the facts—not conclusions—which occurred, from which, on review, it may be determined whether the court had jurisdiction to subject the contemnor to the payment of a fine or commit him to jail.—*State ex rel. Rankin v. District Court*, 276.

Nature of Proceeding.

4. Proceedings in direct and indirect contempts are criminal in their nature, and the power to inflict punishment in either is inherent in the courts.—*State ex rel. Rankin v. District Court*, 276.

Duty of Attorneys.

5. Attorneys are, in a sense, officers of the court, and upon them, above all others, rests the duty to maintain its dignity, the obligation to do so being clearly implied in the oath subscribed by them when entering the practice.—*State ex rel. Rankin v. District Court*, 276.

Power of District Court—How to be Exercised.

6. The power of a court to punish for contempt is not an arbitrary one, but is to be exercised only when the necessity arises, and then, with an intelligent discretion to serve its purpose, under the rules of procedure established by the usages of the courts or prescribed by the statute.—*State ex rel. Rankin v. District Court*, 276.

Power of Legislature.

7. The legislature may prescribe the modes of procedure in contempt proceedings, but cannot take away or abridge the power of courts to inflict punishment therefor.—*State ex rel. Rankin v. District Court*, 276.

Courts must Pursue Statute—Record.

8. Courts in inflicting punishment for contempt must pursue the mode of procedure prescribed by the statute, to the end that upon the record made, the contemnor may apply to the appellate tribunal for a review of the order or judgment finding him guilty.—*State ex rel. Rankin v. District Court*, 276.

Remedies of Contemnor.

9. One adjudged guilty of a contempt of court may have the proceedings reviewed on application for writ of *certiorari* or supervisory control.—*State ex rel. Rankin v. District Court*, 276.

Procedure—Purpose of Statute.

10. *Held*, that the purpose of section 7311, Revised Codes, providing the procedure to be observed by courts in direct contempts, is to prescribe what record must be made to evidence the legality and regularity of the proceeding.—*State ex rel. Rankin v. District Court*, 276.

Indirect Contempts—Record.

11. In indirect contempts, the record consists of the affidavit setting forth the facts constituting the contempt, the process, the answer of the contemnor, the evidence, and the judgment.—*State ex rel. Rankin v. District Court*, 276.

Direct Contempts—Record.

12. The only record made in a case of a direct contempt is the judgment, which must recite the facts showing the contemptuous words, acts or manner, its validity being tested by the recital thus made, and not by evidence supplemental thereto or by facts certified up in the return made by the judge on writ of *certiorari*, or by the record in the case on trial at the time the contempt was committed.—*State ex rel. Rankin v. District Court*, 276.

Attorneys may Explain Conduct Before Court Pronounces Judgment.

13. Before an attorney is adjudged in contempt, he should be accorded an opportunity to explain or excuse his contempt and thus purge himself or show that no contempt was intended.—*State ex rel. Rankin v. District Court*, 276.

Divorce—Failure to Pay Alimony—Supervisory Control—Writ Does not Lie, When.

14. The writ of supervisory control does not lie to relieve one from punishment under an order finding him guilty of contempt for failure to pay temporary alimony, where he neither made application for a modification or revocation of, nor appealed from, the order awarding the alimony.—*State ex rel. Scott v. District Court*, 353.

Same—When Inability to Comply not Defense.

15. Inability to comply with an order awarding alimony *pendente lite* was no defense to a charge of contempt where, after the court had adjudicated his ability to pay, contemnor voluntarily encumbered the property disclosed to the court, and thus put it out of his power to comply with the order.—*State ex rel. Scott v. District Court*, 353.

Same—Defense—Estoppel.

16. The record not disclosing under what representations and circumstances the wife of contemnor signed the mortgage referred to above, the contention that she was estopped to claim that by mortgaging his property he purposely disabled himself from complying with the court's order directing payment of temporary alimony to her *held* without merit.—*State ex rel. Scott v. District Court*, 353.

Same—When Order Committing Contemnor to Jail Void.

17. *Held*, on supervisory control, that the authority of the district court to commit a contemnor to jail until its order directing him to pay temporary alimony should be complied with was, under section 7319, Revised Codes, contingent upon a showing that it was within his power to comply, and that, therefore, the record showing that at the time of his commitment he was financially unable to obey the order, his commitment was void.—*State ex rel. Scott v. District Court*, 353.

CONTRACTS.

Sales,—see, also, Statute of Frauds.

Sales—Varying Terms of Writing—Evidence—Admissibility.

1. *Held*, that evidence explanatory of the circumstances leading up to the making of a written contract of sale of a cash register with reference to a "special" key attachment, as well as of the conversa-

tion had between defendant and plaintiff's agent at the time it was made, was admissible, under section 5036, Revised Codes, and not objectionable as tending to vary the writing.—National Cash Register Co. v. Wall, 60.

Same—Return of Article—When not Duty of Purchaser.

2. A provision in a contract for the sale of a cash register by which title was retained by the seller and which required buyer to pay expenses of transportation for repairs did not require the buyer to return the register to the seller in case it failed in the purpose for which it was sold.—National Cash Register Co. v. Wall, 60.

Same—Breach—Measure of Damages.

3. Where, in an action for the breach of a contract of sale of cattle, the proof sufficiently showed the market price nearest the place of delivery in Montana to enable the jury to arrive at the measure of damages established by section 6081, Revised Codes, admission in evidence of the price actually received for them at Omaha, Nebraska, did not constitute reversible error.—Church v. Zywert, 102.

Same.

4. The measure of damages for breach of a contract to sell livestock was the difference between the contract price and their reasonable market value at the time and place of delivery.—Montana Livestock & Loan Co. v. Stewart, 221.

Same—Erroneous Admission of Testimony—Harmless Error.

5. Where the trial court correctly instructed the jury on the measure of damages as above, error in admitting testimony that the stock had been sold at a figure representing an advance over the contract price was harmless, the witness stating in addition that the reasonable market price of the animals at place of destination was the amount realized on resale.—Montana Livestock & Loan Co. v. Stewart, 221.

Banks and Banking—Checks—What Constitutes Dishonor.

6. Inquiry by telephone of a bank upon which the buyer of livestock had drawn a check in part payment, whether it would guarantee the check and the bank's refusal, coupled with a statement by the cashier of his opinion that it would be paid when presented, did not amount to a dishonor of the check nor justify the seller in his refusal to carry out the contract, since a check can only be dishonored by presentment either directly to the bank on which it is drawn or through another bank in which it is deposited for collection.—Montana Livestock & Loan Co. v. Stewart, 221.

Same—Checks—Dishonor—Correct Instruction.

7. An instruction that a contract of sale could not be avoided or rescinded for nonpayment of a check given in part payment without presentment of the check to the bank on which it was drawn and refusal of payment was not open to the objection that it advised the jury that the check must be presented to the bank in person.—Montana Livestock etc. Co. v. Stewart, 221.

Same—Checks—Varying Terms of Writings.

8. After a check given in part payment is accepted, it supersedes oral negotiations of the parties to the contract with reference to the payment, and testimony of purported statements concerning it by the maker either before or after its return by the bank to which it was presented for payment but upon which it was not drawn was inadmissible as an attempt to vary the terms of a written instrument.—Montana Livestock etc. Co. v. Stewart, 221.

Same—"Innocent Purchaser."

9. To be an "innocent purchaser," a vendee must in good faith pay a valuable consideration without notice of outstanding legal or equitable rights.—*Degenhart v. Cartier*, 245.

Corporations—Power of Secretary to Make Contracts—Estoppel.

10. Generally speaking, the secretary of a corporation has no implied authority, as an incident to his office, to contract for his corporation, but where the corporation conducts its affairs in such a way as to induce those who deal with it to act upon the assumption that he has authority to bind it as its general agent, it is precluded, upon the principle of estoppel, to assert that he was without power to do the act for which it is sought to be held liable.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Contracts in Writing—When not Completed.

11. Where it was the understanding of the parties that the terms of a proposed contract were to be reduced to writing and signed by them, and this was not done, it did not become a completed contract, even though the terms thereof as proposed by defendant through letters and telegrams were definitely accepted through the same medium by plaintiff.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Work and Labor—*Quantum Meruit*—Implied Contracts.

12. Where the president and general manager of a corporation with full knowledge of an agreement between plaintiff and its secretary, which was to be reduced to writing but was never completed, under which plaintiff was to continue in charge of its property and care for it as he had theretofore done under a previous contract which had expired, and personally instructed him to remain in charge and that he would be reimbursed for expenses incurred and compensated for his services, plaintiff was entitled to recover under an implied contract.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Same—Reasonable Value—Evidence—Sufficiency.

13. In an action on an implied contract for services rendered in taking care of orchard property, where it appeared that he had been paid \$125 a month for like services under a previous contract, and that under a contemplated contract which failed of execution he was to receive \$100 for the same services, a finding by the court in a trial without a jury that \$100 a month was their reasonable value was proper, although plaintiff did not state in his testimony what his services were worth and there was no specific evidence on the question of value.—*Hopkins v. Paradise Heights Assn.*, 404.

Sales—Inconsistent Defenses—Rescission—Breach of Warranty—Election of Remedies.

14. In an action to recover the purchase price of farm machinery in which defendant relied as defenses on rescission of the contract for failure of consideration and on breach of warranty, the court erred in refusing plaintiff's motion to compel defendant to elect on which of the two inconsistent defenses he would rely.—*Advance-Rumely Thresher Co. v. Terpening*, 507.

Same—Recovery of Purchase Price—Defenses—Remedies Available.

15. A dissatisfied buyer may either confirm the contract and sue for damages for breach of warranty, or rescind and sue for recovery of partial payments made, but he cannot rescind and thereupon recover on the contract which has been rescinded and therefore is no longer in being.—*Advance-Rumely Thresher Co. v. Terpening*, 507.

Same—Rescission—Estoppel.

16. Where a buyer of farm machinery continued in possession thereof and operated it for practically three seasons and up to the time the seller brought action to recover the purchase price, the former was estopped to claim rescission of the contract for failure of consideration.—Advance-Rumely Thresher Co. v. Terpening, 507.

Same—Breach of Warranty—Measure of Damages.

17. The measure of damages for a breach of warranty on a sale of personal property is the difference in value between the article sold and what it should be according to the warranty.—Advance-Rumely Thresher Co. v. Terpening, 507.

Same — Divisibility — Consideration — Partial Failure — Value—Failure of Proof—Effect.

18. Where a contract of sale comprising a traction engine and other pieces of farm machinery provided that it was divisible and that failure of any one of them to fulfill the warranty accompanying it should not affect the liability of the buyer for any other, and the buyer in an action to recover their price defended on the ground of breach of warranty, his evidence showing defects in the engine only but failing to show what portion of the purchase price covered it, the jury was in no position, under the above rule, to award defendant damages suffered by reason of the alleged breach as to it.—Advance-Rumely Thresher Co. v. Terpening, 507.

Same—Breach of Warranty—Notice—Retention and Use After Discovery of Defect—Waiver.

19. Retention and use of farm machinery for more than two years after discovery of an alleged breach of warranty, without attempt on the part of the buyer to comply with the terms of the contract of sale requiring him to give immediate notice to the vendor of defects discovered, barred him from relying on the breach as a defense in an action to recover on the notes given in payment.—Advance-Rumely Threshing Co. v. Terpening, 507.

Same—Voluntary Retaking and Cancellation—Evidence—Insufficiency.

20. Defendant's allegation of a voluntary retaking of the machinery by the seller and a consequent cancellation of the contract, *held* not supported by evidence to the effect that its agent, on failure of defendant to meet payments as stipulated, removed a drive belt from one of the machines, which, however, was promptly returned on written demand of defendant on his promise that he would make payment as soon as possible.—Advance-Rumely Threshing Co. v. Terpening, 507.

Contracts of Sale — Lands — How Enforceable Lease to Vendor may be Created.

21. Where a contract of sale of lands contained a provision for the execution of a lease of some of them by the buyer to the seller under terms embodied in the contract and to be thereafter reduced to a formal writing, an enforceable contract of lease was created though the writing was never executed.—Blinn v. Hutterische Society of Wolf Creek, 542.

Same—Leases—How to be Construed.

22. In construing the provisions for a lease, the courts will look to the practical construction given it by the parties themselves, rather than to the particular phraseology employed; hence where parties to a contract treated it as though it created the relationship of landlord and tenant, it will be treated as a lease and not as an option for one.—Blinn v. Hutterische Society of Wolf Creek, 542.

Same—Lands—Landlord and Tenant—Tenant at Will—Title to Crops.

23. Where the buyer of lands permitted the seller to remain in possession of certain portions of and cultivate them, and treated him as a tenant, the latter was at least a tenant at will and as such entitled to the crops sown and cultivated by him.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

“Executed” and “Executory” Contracts—Definition.

24. An “executed contract” is one where nothing remains to be done by either party, and conveys a chose in possession; while an “executory contract” is one in which a party binds himself to do or not to do a particular thing in the future, conveying a chose in action.—*Lewis v. Lambros*, 555.

Executed and Executory.

24a. A contract may be partly executed and partly executory, and may be executory as to one party and executed as to the other.—*Lewis v. Lambros*, 555.

Sales—Bill of Sale not Necessary to Validity.

25. A bill of sale is not necessary to make a valid sale of personalty.—*Lewis v. Lambros*, 555.

Failure to Make Future Payment—Effect on Title.

26. Failure to make payment for personal property sold on the installment plan does not of itself restore title to the vendor.—*Lewis v. Lambros*, 555.

Executed Contract, When.

27. Sale of personalty consisting of a house and contents (without the lot on which it was situate) on deferred payments, the agreement not containing any provision for forfeiture of the buyer's rights on failure to make payments or for reservation of title in the seller, *held* to have been an executed, and not an executory contract.—*Lewis v. Lambros*, 555.

Undue Influence—Cancellation—Essentials.

28. Under section 4981, Revised Codes, to make the defense of undue influence available, the party alleged to have exercised such influence over another in the execution of a contract must have occupied a superior position with reference to the other by reason of a real or apparent authority over him arising out of pre-existing relations, or assumed at the time because of the weakness of mind, distress or necessities of the other, by reason of which he knowingly gained an unconscionable advantage.—*Emerson-Brantingham I. Co. v. Anderson*, 617.

Same—Burden of Proof—Contracts—Validity—Presumptions.

29. Since the law presumes that a contract fair on its face was the result of the voluntary act of the parties to it, the burden is on him who seeks release from an obligation, apparently voluntarily assumed, on the ground of undue influence, to show by a preponderance of the evidence that it was induced by such predominating influence exerted over him as to preclude the presumption that he acted from free choice.—*Emerson-Brantingham I. Co. v. Anderson*, 617.

Same—Burden of Proof Shifts, When.

20. Where antecedent confidential relations are shown so as to create a presumption of undue influence, the burden shifts to the adverse party to show that the negotiations resulting in the contract were conducted at arm's-length, uninfluenced by the superior position held by him.—*Emerson-Brantingham I. Co. v. Anderson*, 617.

Same—What Does and What Does not Constitute.

31. Solicitation, importunity, argument and persuasion are not undue influence, and a contract may not be set aside merely because one party used such means to obtain the consent of the other; influence becoming undue only when the means employed work a dominion over the will of another to such an extent as to destroy free agency or to constrain him to do against his will what he is unable to refuse.—Emerson-Brantingham I. Co. v. Anderson, 617.

Same—Cancellation of Instruments—Evidence—Insufficiency.

32. Where a chattel mortgagee's representative and the mortgagor's executrix were strangers, and no fiduciary relationship existed between them, and the executrix was not affected by any weakness of mind or laboring under any pressing necessity, a mortgage, executed by her on her own property on his solicitation, upon apparently due consideration, was not invalid for undue influence, merely because it was given about two months after the death of her husband, when her grief had perhaps not entirely subsided.—Emerson-Brantingham I. Co. v. Anderson, 617.

Mortgages—Forbearance to Foreclose—Consideration.

33. Forbearance from foreclosing a mortgage executed by defendant's husband in his lifetime, *held* to have been a sufficient consideration for the execution of an additional one on property owned by her.—Emerson-Brantingham I. Co. v. Anderson, 617.

CONVERSION.

Possession of Property—Complaint—Sufficiency—Inferences.

1. In an action for damages in conversion, where plaintiff alleged ownership of the property at the time of the conversion, and further, that he was lawfully possessed of the same, it was properly to be inferred that he was then entitled to possession.—Didriksen v. Broadview Hardware Co., 421.

Right of Plaintiff to Recover Fixed as of Date of Conversion.

2. In an action of the nature of the above, plaintiff's right to damages becomes fixed as of the date of the conversion and does not depend upon his ownership or right to possession at any subsequent time.—Didriksen v. Broadview Hardware Co., 421.

Appeal and Error—Corporate Capacity—Defective Complaint—Failure to Demur—Waiver.

3. In the absence of a special demurver pointing out that the complaint was defective in that the corporate capacity of defendant was alleged only as of the date of the commencement of the action for damages instead of as of the date of the conversion, the formal defect *held* not fatal when urged for the first time on appeal.—Didriksen v. Broadview Hardware Co., 421.

Action by Chattel Mortgagee—Allegation of Ownership—Complaint—Insufficiency.

4. *Held*, that the complaint in an action to recover possession of chattels, covered by mortgage, alleged to have been unlawfully seized and wrongfully detained by defendants, was insufficient in the absence of an averment that plaintiff mortgagee was the owner and holder of the notes secured by the mortgage at the date of conversion.—Perkins & Co. v. Duluth B. & M. Co., 691.

CORPORATIONS.

See, also, Principal and Agent.

Corporate capacity—Defective pleading—Failure to demur—Waiver,—see Pleading and Practice, 20.

Power of Secretary to Make Contracts—Estoppel.

1. Generally speaking, the secretary of a corporation has no implied authority, as an incident to his office, to contract for his corporation; but where the corporation conducts its affairs in such a way as to induce those who deal with it to act upon the assumption that he has authority to bind it as its general agent, it is precluded, upon the principle of estoppel, to assert that he was without power to do the act for which it is sought to be held liable.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Powers of Agents—How Determinable.

2. Since a corporation can act only through its agents, the circumstances of each case must be looked to to determine whether it shall be held bound by the acts of its officers.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

COSTS.

Removal of county officers—Liability of county,—see Counties, 8.

COUNTERCLAIMS.

Complaint anticipating defense,—see Pleading and Practice, 2.

COUNTIES.

Change in boundaries—New counties—Chattel mortgage—Renewal filed in old county—Effect on rights of mortgagee,—see Mortgages, 6.

Claims Against—Statutes—"Accounts"—Definition.

1. *Held*, that the word "accounts" in section 2894, Rev. Codes, authorizing the board of county commissioners to examine, settle and allow "all accounts legally chargeable against the county," must be understood in a broad, generic sense and as including any right to or claim for money due from and payable by the county, and not as limited to claims in the form of accounts only.—*State ex rel. Dolin v. Major*, 140.

Same—Approval by Auditor Necessary.

2. Before claims against a county having an auditor (other than claims for salaries or the amounts of which are fixed by law), whether liquidated or not or incurred for material purchased by the commissioners under contract, can be allowed by the board, they must have the approval of the auditor, otherwise the board is without authority to order them paid.—*State ex rel. Dolin v. Major*, 140.

Same—Disapproval by Auditor—Duty of County Clerk.

3. Where the board of commissioners allows and orders paid a claim against the county which has not indorsed upon it the approval of the auditor, it is the duty of the county clerk to refuse to draw a warrant in payment of it.—*State ex rel. Dolin v. Major*, 140.

Same—Approval by Auditor not Binding upon Board of Commissioners.

4. The approval of a claim against a county by its auditor is not binding upon the board of commissioners, it being clothed with discretion to determine whether it is or is not a proper charge against the county.—State ex rel. Dolin v. Major, 140.

Same—Disapproval by Auditor—Effect.

5. Upon presentation to it of a claim which has been disapproved by the county auditor, the board of commissioners must pass upon it and make an order of disallowance, so that the claimant may appeal to the district court or bring his action against the county, neither of which remedies would be available to him without such action by the board.—State ex rel. Dolin v. Major, 140.

Same—Disapproval by Auditor—Powers of District Judge—Constitution.

6. *Semble*: It would seem that the proviso in section 3106, Revised Codes, empowering district judges to order payment of a claim against a county after disapproval by the auditor, is repugnant to section 1 of Article IV of the Constitution in that it undertakes to cast upon district judges a power which pertains exclusively to the executive branch of the government.—State ex rel. Dolin v. Major, 140.

Same—County Auditor—Powers.

7. *Held*, that in view of the power granted a county auditor with respect to passing upon claims against the county, which is as much *quasi-judicial* and as extensive as that of the board of commissioners in examining them, the contention that his duty is limited to ascertaining whether claims are in proper form and that the amounts are correct, and that therefore the board is not bound by his disapproval of a claim but may allow and order it paid, is without merit.—State ex rel. Dolin v. Major, 140.

Officers—Removal—Costs—Witness Fees—Liability of County.

8. *Held*, that, in a proceeding brought by the attorney general under section 9006, Revised Codes as amended (Laws 1917, Chap. 25), for the removal of a county officer, the petition in which showed on its face that he acted in the name and in behalf of the state, which proceeding, however, resulted in favor of the accused, the county, and not the attorney general personally, was liable for the payment of witnesses, and that the district court erred in granting an injunction restraining the payment of their fees. Griggs v. Glass, 476.

COUNTY AUDITOR.

Duties and powers,—see Counties, 1-7.

COUNTY COMMISSIONERS.

Duties and powers in passing upon claims against county,—see Counties, 1-7.

COUNTY OFFICERS.

Proceedings for Removal—Costs—Witness Fees—Liability of County.

1. *Held*, that, in a proceeding brought by the attorney general under section 9006, Revised Codes as amended (Laws 1917, Chap. 25), for the removal of a county officer, the petition in which showed on its face that he acted in the name and in behalf of

the state, which proceeding, however, resulted in favor of the accused, the county, and not the attorney general personally, was liable for the payment of witnesses, and that the district court erred in granting an injunction restraining the payment of their fees.—*Griggs v. Glass*, 476.

CRIMINAL LAW.

Selection of Jury—Peremptory Challenge by Trial Judge—What may Constitute.

1. Where a juror in a criminal prosecution had shown himself possessed of the statutory qualifications for jury service, a suggestion by the trial judge to the county attorney that if he would challenge the juror the challenge would be sustained, amounted to the exercise of a peremptory challenge—a right not possessed by such judge—was prejudicial error.—*State v. Diedtman*, 13.

Same—Challenge for Cause may be Waived.

2. A challenge for cause may be waived, and is waived, unless availed of at the proper time.—*State v. Diedtman*, 13.

Same—Right of Defendant.

3. A defendant is entitled to insist that the jury shall be selected according to law.—*State v. Diedtman*, 13.

Sedition—Witnesses for Prosecution—Testimony to Support Character—When Inadmissible.

4. Testimony introduced in a prosecution for sedition, to support the good character of the state's chief witness before it had been impeached, was inadmissible under section 8026, Revised Codes.—*State v. Diedtman*, 13.

Same—Reputation of Prosecuting Witness—Hearsay.

5. Testimony that the federal Department of Justice and the attorney general of the United States had investigated and passed favorably upon the record of a state witness, an ex-convict and alien enemy employed to detect violations of the sedition statute, was inadmissible as hearsay.—*State v. Diedtman*, 13.

Same—Witnesses—Cross-examination—Impeachment on Collateral Matter.

6. Where a character witness for defendant had testified that the latter's reputation for honesty and integrity was good, it was error to require him to answer the question on cross-examination whether on previous occasions he had not used language indicating his pro-German sympathies; a witness not being subject to impeachment upon a collateral matter brought out on cross-examination.—*State v. Diedtman*, 13.

Same—Cross-examination—Collateral Matter—Test.

7. The test by which to determine in a criminal prosecution whether a question asked a witness of defendant on cross-examination relates to a collateral matter on which the witness' answer is conclusive, is whether the state could properly have introduced evidence on the subject in its case in chief.—*State v. Diedtman*, 13.

Same—Witness Testifying from Memorandum—Cautionary Instruction.

8. *Held*, that where a witness testified to seditious language used by defendant, from a memorandum extended by the former from notes made by him when the statements were said to have been made, refusal to instruct the jury to receive such testimony with caution was error, defendant having been entitled to such an instruction under section 8020, Revised Codes, as a matter of absolute right.—*State v. Diedtman*, 13.

Same—Detectives—Cross-examination—Undue Restriction.

9. Where the state's principal witness in a prosecution for sedition, a detective, was an alien enemy, self-confessed forger and ex-convict, who had been in this country but a comparatively brief period, it was prejudicial error to restrict his cross-examination; in such cases a broad liberality of cross-examination should be indulged.—*State v. Diedtman*, 13.

Same—Issues—Jury Questions.

10. In a prosecution under Chapter 11, Laws Extra. Session of 1918, for making seditious utterances, the plea of not guilty put in issue not only the question whether defendant had used the language charged, but whether, if used, it was calculated to bring the form of government, the Constitution, army and navy into contempt, scorn and disrepute—a fact to be determined by the jury.—*State v. Diedtman*, 13.

Same—Issues—Definition—Instructions.

11. Failure of the trial court to define the issues involved in a prosecution for sedition as set forth above (paragraph 10) in its instructions to the jury, or to advise them that it was necessary to a conviction that the state prove beyond a reasonable doubt that defendant uttered the objectionable language and that such language was calculated to have the effect charged in the information, was error, as was also the giving of an instruction that they could find defendant guilty if he had at any time between a certain date and the filing of the information done any of the things condemned by the Sedition Act.—*State v. Diedtman*, 13.

Same—Harmless and Harmful Error—How Determined.

12. A judgment of conviction will not be reversed for technical errors or defects appearing in the record which do not affect the substantial rights of the defendant, the question whether the particular error shall be classed as harmful or harmless depending upon the peculiar facts and circumstances in the particular case under review. *State v. Diedtman*, 13.

Circumstantial Evidence—Rule.

13. To sustain a conviction on circumstantial evidence the criminatory circumstances must not only be consistent with each other, but must also point clearly to the guilt of the accused, or be inconsistent with any other rational hypothesis.—*State v. Gomez*, 177.

Homicide — Circumstantial Evidence — Insufficiency — Acquittal — Directed Verdict—When Proper.

14. Where, in a prosecution for homicide in which the evidence was entirely circumstantial, some of the circumstances proved, considered apart from the rest of the evidence, tended to incriminate defendant, while others, proof of which could not be questioned, so far explained the criminatory force of the former, that they left no substantial basis for the conclusion of his guilt, it was the duty of the trial judge to direct the jury to return a verdict of not guilty.—*State v. Gomez*, 177.

Criminal Law—Advising and Directing Acquittal—Statutes.

15. *Held*, that section 9297, Revised Codes, providing that the district court may advise the jury to acquit (which advice they may disregard) applies only where the court deems the evidence, though tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant conviction, and not where the evidence is wholly insufficient to sustain a conviction, in which event a direction to acquit is the proper procedure.—*State v. Gomez*, 177.

Information—Demurrer Sustained—Record on Appeal by State.

16. Where the state appeals from an order sustaining a demurrer to an information, it must present the information, with the demurrer and the trial court's ruling thereon, in a bill of exceptions duly settled and allowed, under the mandatory provisions of section 9347, Revised Codes, else the supreme court is without jurisdiction to entertain the appeal.—*State v. Libby Yards Co.*, 444.

Gaming—Hearsay Testimony—Inadmissibility—Curing Error.

17. Error committed in permitting an officer to testify to a conversation had with one D., charged jointly with defendant for gambling but not on trial with him, relative to defendant's intention to open a gambling-room, without anything to show a conspiracy between defendant and D., *held* to have been cured by subsequent testimony of D. that defendant had told him that he intended to open such a room.—*State v. Teubner*, 482.

Information—Insufficiency—Methods of Objection.

18. Under section 9208, Revised Codes, the objection that the facts stated in an information do not constitute a public offense may be taken either by demurrer, or at the trial under a plea of not guilty, or after the trial in arrest of judgment.—*State v. Smith*, 567.

Same—Information—Interpretation—Inferences not Permissible.

19. In interpreting the language used in an information, inferences, however reasonable, cannot be drawn upon to aid the pleader, and no presumption can, for this purpose, be indulged, since the legal presumption in a criminal case is that defendant is innocent.—*State v. Smith*, 567.

Sedition—Information—Uncertainty—Fatal Defect.

20. *Held*, that an information charging sedition in that defendant feloniously stated that "she wished the people would revolt and that she would shoulder a gun and get the president the first one," was fatally defective for failure to meet the degree of certainty required by section 9156, Revised Codes, it being conjectural whether defendant meant the people or the president of the United States, or the people or president of any other country.—*State v. Smith*, 567.

Same—Information—Seditious Language—May be Charged, How.

21. An information charging one with the utterance of seditious language need not set forth the exact words used by defendant, the pleader being permitted to allege that the language used was "in substance as follows."—*State v. Smith*, 567.

Homicide—Defense—Insane Impulse—Evidence—Admissibility.

22. In a prosecution for murder in which the defense was irresistible insane impulse induced by unspeakable crimes committed on defendant by deceased, testimony touching the former's association with the latter, the defendant's conduct and habits as well as statements and declarations made by him before and after the homicide, reflecting in any way upon his mental condition, was admissible, the guide for determining its admissibility being remoteness in time from the homicide.—*State v. Colbert*, 584.

Same—Rebuttal Testimony—Admissibility.

23. It was competent for the state to controvert the testimony of defendant's witnesses above referred to, by evidence tending to show that he was on friendly terms with him and that there was nothing unusual in his conduct or physical condition during the time testified to.—*State v. Colbert*, 584.

Same—Rebuttal Testimony to Discredit Defendant—Admissibility.

24. Evidence otherwise competent may not be excluded on the ground that it had an incidental tendency to disclose something

to defendant's discredit, i, e., that he was in the habit of frequenting saloons.—State v. Colbert, 584.

Same—Presumptions.

25. The homicide being established, nothing else appearing, the presumption of innocence is overcome, and the presumption that defendant intended the ordinary consequences of his voluntary act comes to the aid of the prosecution and establishes the necessary element of malice.—State v. Colbert, 584.

Same—Murder in Second Degree—Proof Required.

26. To warrant a finding of murder in the first degree, the state must establish premeditation and deliberation, while to find defendant guilty of murder in the second degree, proof of the killing, alone is sufficient.—State v. Colbert, 584.

Same—Insanity—Burden of Proof—Instructions.

27. In a prosecution for murder, an instruction that, the commission of the homicide being proved, the burden rested upon defendant to offer evidence in support of his defense, the burden, however, being no greater than to introduce evidence sufficient to raise a reasonable doubt as to his guilt, was proper.—State v. Colbert, 584.

Same—Proof in Mitigation—Burden on Defendant, When.

28. The homicide having been established and the evidence introduced by the state containing nothing tending to mitigate, justify or excuse it, it was incumbent upon defendant to introduce such evidence, failing to do which a verdict of guilty was the logical result.—State v. Colbert, 584.

Same—Defense—Insanity—Proper Instruction.

29. An instruction that if the jury believed beyond a reasonable doubt that defendant committed the crime as charged, knowing it was wrong and mentally capable of choosing either to do or not to do the act and of governing his conduct in accordance with his choice, they should find him guilty, though believing he was not entirely and perfectly sane, properly stated the law.—State v. Colbert, 584.

Same—Instructions to be Considered as a Whole.

30. The charge to the jury must be considered as a whole, and if a particular instruction is correct in point of law and applicable to the evidence, it is not erroneous because it does not refer to instructions on other branches of the case with which it is consistent. State v. Colbert, 584.

Same—Insanity—Refusal to Give Separate Instruction—When not Reversible Error.

31. Where, from the charge as a whole, the jury must have understood that after defendant had introduced evidence tending to show that he was insane when he committed the homicide for which he was on trial the burden then shifted to the state to establish his sanity, failure to give a separate instruction to that effect was not reversible error.—State v. Colbert, 584.

Motion for New Trial—*Nunc Pro Tunc* Order—Invalidity—Fugitive from Justice.

32. Where defendant, after being found guilty of crime, became a fugitive from justice, a *nunc pro tunc* order made on surrendering himself some sixteen months later, and long after the time for perfecting his motion for new trial had expired, extending the time for filing his bill of exceptions and affidavits, held of no effect and

that the motion for new trial was properly denied.—*State v. Francis*, 659.

Grand Larceny—Appeal—Record—Errors Reviewable.

33. Under section 9416, Revised Codes, defendant, on appeal from the judgment of conviction, may, by bill of exceptions, bring before the court errors in the decision of questions of law arising during the course of the trial; exclusive of those embraced within the provisions of the statute providing for new trials.—*State v. Francis*, 659.

Instructions—Preponderance of Evidence—Error.

34. An instruction on "preponderance of the evidence" has no place in a criminal trial, the defendant being required to do no more in the way of evidence in his behalf than introduce sufficient to raise a reasonable doubt of his guilt.—*State v. Francis*, 659.

Same—Circumstantial Evidence—To be Viewed as a Whole.

35. An instruction offered by defendant on the law of circumstantial evidence to the effect that if there was any single fact proved to the satisfaction of the jury inconsistent with his guilt, acquittal should follow, was correctly refused, since the jury must draw its conclusion from the circumstances relied upon for conviction as a whole, and if then they are inconsistent with any rational hypothesis other than his guilt, a verdict of guilty may follow.—*State v. Francis*, 659.

Same—Failure of Defendant to Offer Proper Instruction—Effect.

36. Under section 9271, Revised Codes, it was the duty of defendant to offer a correct instruction on the law of circumstantial evidence, failing in which he was in no position to complain of omission to instruct the jury on that point.—*State v. Francis*, 659.

Same—Circumstantial Evidence—When Instruction Required—Theory of Case.

37. The necessity for an instruction on circumstantial evidence arises only in cases depending entirely on such evidence; hence where counsel for defendant conceded on the trial that it was not the theory of the defense that the case depended upon circumstantial evidence alone, refusal of an instruction was not error.—*State v. Francis*, 659.

Destruction of Evidence by Defendant—Evidence—Admissibility.

38. Testimony tending to show destruction or suppression of evidence by defendant, though incidentally having reference to a separate offense, is admissible as a circumstance tending toward his guilt.—*State v. Francis*, 659.

Failure to Offer Instruction—Presumptions.

39. Defendant, not having offered an instruction as to the purpose for which the testimony last above mentioned was received, must be presumed to have been satisfied that none was necessary, and was therefore in no position to complain of failure to instruct thereon.—*State v. Francis*, 659.

Criminal Law—Former Jeopardy—Waiver.

40. The plea of former jeopardy is a privilege of which one accused of crime may or may not avail himself, and which he may waive.—*State ex rel. Stranahan v. District Court*, 684.

CROPS.

Title to—Tenant at will, see Contracts, 23.

CROSS-EXAMINATION.

Impeachment of witness on collateral matter—Undue restriction,—see Evidence, 3-5.

When refusal to strike proper,—see Evidence, 25.

DAMAGES.

Breach of warranty,—see Contracts, 17.

Destruction of mortgaged personalty,—see Mortgages, 10.

Measure of—Sales—Breach of Contract,—see Contracts, 3, 4.

DEEDS.

Construction—Doctrine of the Last Antecedent—Applicability.

1. The rule that in the construction of a statute, relative and qualifying words, phrases and clauses must, under the doctrine of the last antecedent, be applied to the word or phrase immediately preceding, and are not to be construed as extending to or including others more remote, is applicable to the construction of deeds.—Cobban Realty Co. v. Chicago etc. Ry. Co., 188.

Same—Object of Construction.

2. The object in construing a deed is to ascertain the intention of the parties to it.—Cobban Realty Co. v. Chicago etc. Ry. Co., 188.

Description of Property—Estoppel.

3. Where a railway company seeking to obtain a right of way furnished the data, including the right of way map, from which the description in a deed to the railroad was obtained, the company was estopped to say that it did not intend that the description in the deed should operate to convey the ground shown upon the map.—Cobban Realty Co. v. Chicago etc. Ry. Co., 188.

DEFAULT JUDGMENTS.

See Judgments.

DEFENSES.

Anticipating defense in complaint,—see Pleading and Practice, 2.

In action for malicious prosecution,—see Malicious Prosecution, 4, 7.

Inadequacy of consideration and intoxication,—see Specific Performance, 2-6.

Inconsistent—When they may and may not be pleaded,—see Pleading and Practice, 9, 32, 33.

In proceeding under writ of supervisory control,—see Supervisory Control, 7.

DEMURRER.

Appeal from order sustaining demurrer to information—Record on appeal,—see Criminal Law, 16.

Argument not necessary,—see Pleading and Practice, 30.

Challenging sufficiency of complaint—Exception once saved, saved for all purposes during trial,—see Pleading and Practice, 29.

Defective complaint—Failure to demur—Waiver,—see Pleading and Practice, 20.

THE JURY

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Same.

5. A judge at chambers in his own district cannot do anything in relation to cases pending there, other than what the statute authorizes.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Equity Power--When not to be Invoked.

6. The equity power of the district court may not be invoked by a litigant to obtain any relief when a plain, speedy and adequate remedy is afforded in the ordinary course of law.—*Philbrick v. American Bank & Trust Co.*, 376.

Probate Courts—Extent of Jurisdiction.

7. While the jurisdiction of the district court, when exercising its probate powers, is special and limited, depending upon the provisions of the Code, yet by implication it also possesses all the powers incidentally necessary to an effective exercise of the powers expressly conferred.—*Philbrick v. American Bank & Trust Co.*, 376.

Testamentary Trusts—Termination—Exclusive Jurisdiction.

8. *Held*, that section 7698, Revised Codes, confers exclusive jurisdiction upon the district court when sitting as a probate court, to determine whether the purpose of a testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution.—*Philbrick v. American Bank & Trust Co.*, 376.

Jurisdiction not Extraterritorial.

9. Jurisdiction of district courts in this state in probate matters pertaining to real property is confined to property situated within its boundaries, any order or decree affecting realty in another state being a nullity.—*In re Estate of Bruhns*, 526.

DIVORCE.

See Husband and Wife.

DRAINS AND DRAINAGE DISTRICTS.**Board of Review—Jurisdiction on Appeal—Prohibition.**

1. A drainage district was duly organized under the provisions of Chapter 147 of the Laws of 1915. No effort was made by *certiorari* or otherwise to review the action of the drain commissioner in establishing the district. Contracts were let and warrants issued to a large amount. As organized, the district embraced 231,563 acres. One party interested (a county) appealed from the final order of the commissioner. A board of review was appointed, which thereupon reviewed all of the acts and decisions of the commissioner and made its final report excluding from the district about 225,000 acres, leaving approximately 6,000 acres in it. *Held*, on appeal from a judgment quashing an alternative writ of prohibition, that the board was without authority to hear and determine the legality of all of the acts and decisions of the commissioner not appealed from and to make the exclusion it did, but was limited in its review to the one matter properly before it—the appeal of the county. *State ex rel. First National Bank of Molt v. Heath*, 337.

"Review" on Appeal—Definition.

2. The term "review" as used in the Drainage Act (Chap. 147, Laws of 1915) giving the reviewing board power to review all assessments and correct errors therein, etc., means review on appeal taken, as provided by the Act, by a party deeming himself aggrieved.—*State ex rel. First National Bank of Molt v. Heath*, 337.

DURESS.

Release from payment of promissory note,—see Promissory Notes, 1, 2

EJECTMENT.

See Boundaries.

ELECTION OF REMEDIES.

See Pleading and Practice, 32.

ELECTIONS.

Mandamus—Right of Political Party to have Names of Candidates for Presidential Electors Appear upon Ballot.

1. *Held*, on application for writ of mandate, that while a political party not in existence at the time the primary election for presidential and vice-presidential primary election was held was entitled to have the names of its candidates for these offices placed upon the ballot under the provisions of section 521, Revised Codes, one in existence at that time had no such right.—State ex rel. Richardson v. Stewart, 707; State ex rel. Williams v. Stewart, 708.

ESTATES OF DECEASED PERSONS.

Testamentary Trusts—Termination—Exclusive Jurisdiction.

1. *Held*, that section 7698, Revised Codes, confers exclusive jurisdiction upon the district court when sitting as a probate court, to determine whether the purpose of a testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution.—State ex rel. Philbrick v. District Court, 376.

Same.

2. Since section 7698, Revised Codes, affords a plain, speedy and adequate remedy for the termination of testamentary trusts in probate proceedings then pending before the district court, a demurrer to a complaint in equity seeking the same relief was properly sustained and the cause dismissed.—State ex rel. Philbrick v. District Court, 376.

Same—Wills—Construction.

3. A will under which all of testator's estate was bequeathed to one of his sisters to be held in trust for another who was to receive a stated amount each year for life, the trustee to have what remained at the death of the beneficiary, construed, and *held* that it was the intention of the testator that the trust should continue during the life of the beneficiary and that therefore the latter, as only heir of the trustee, was not entitled to have the entire estate delivered to her on the death of the trustee.—State ex rel. Philbrick v. District Court, 376.

Probate Courts—Residence of Decedent in Other State—Distribution of Estate in This and Sister State.

4. An intestate died in California leaving property there of the value of less than \$1,500, and also property in this state; the probate court of California distributed all of the property there situated to the widow; the court in Montana, in proceedings not intended as ancillary to those had in California, and regardless of what she had received in that state, awarded to her one-third of

the Montana property and two-thirds to the children. *Held*, that the decree was correct as in accordance with statute.—In re Estate of Bruhns, 526.

Same—Jurisdiction not Extraterritorial.

5. Jurisdiction of district courts in this state in probate matters pertaining to real property is confined to property situated within its boundaries, any order or decree affecting realty in another state being a nullity.—In re Estate of Bruhns, 526.

Probate Courts of Other States—Decrees—Presumptions.

6. A decree made by a court of another state in a probate proceeding will be presumed to have been made within jurisdiction and in accordance with its laws, and is conclusive upon courts of this state in every matter in which it is conclusive in the foreign state.—In re Estate of Bruhns, 526.

ESTOPPEL.

See, also, Contempt, 16.

Deeds—Description of Property.

1. Where a railway company seeking to obtain a right of way furnished the data, including the right of way map, from which the description in a deed to the railroad was obtained, the company was estopped to say that it did not intend that the description in the deed should operate to convey the ground shown upon the map.—Cobban Realty Co. v. Chicago etc. Ry. Co., 188.

Destroying Mortgage Security—What not Defense.

2. Where mortgaged property is injured or its value lessened, the wrongdoer is liable to the mortgagee and may not be heard to justify his wrongful act by invoking the provisions of a contract under which the property would have become the property of another in the event of a certain contingency.—Robison v. Dover Lumber Co., 231.

Cities and Towns—Taxation—Special Improvement Districts—Right to Object.

3. Failure of an owner of town property to make protest to the creation of a special improvement district comprising an area of 14,000 square feet did not estop him from thereafter complaining of the inclusion of an additional area of equal extent made without his knowledge or consent, and of the proportionate increase in his tax.—Pool v. Town of Townsend, 297.

Corporations—Power of Secretary to Make Contracts.

4. Generally speaking, the secretary of a corporation has no implied authority, as an incident to his office, to contract for his corporation; but where the corporation conducts its affairs in such a way as to induce those who deal with it to act upon the assumption that he has authority to bind it as its general agent, it is precluded, upon the principle of estoppel, to assert that he was without power to do the act for which it is sought to be held liable.—Hopkins v. Paradise Heights F. G. Assn., 404.

Sales—Rescission.

5. Where a buyer of farm machinery continued in possession thereof and operated it for practically three seasons and up to the time the seller brought action to recover the purchase price, the former was estopped to claim rescission of the contract for failure of consideration.—Advance-Rumely Threshing Co. v. Terpening, 507.

EQUITY.

See, also, particular subjects of equity.

Admission of irrelevant testimony—Presumptions,—see Evidence, 17.
 Evidence—Sufficiency—Findings—Review,—see Appeal and Error, 14.
 Findings—Evidence—Scope of Review,—see Findings, 4.
 Jurisdiction of district courts,—see District Courts, 6.
 What constitutes judgment,—see Judgments, 7.

EVIDENCE.

See, also, Criminal Law.

Scintilla insufficient to submit personal injury case to jury,—see Personal Injuries, 2.

Criminal Law—Witnesses for Prosecution—Testimony to Support Character—When Inadmissible.

1. Testimony introduced in a prosecution for sedition, to support the good character of the state's chief witness before it had been impeached, was inadmissible under section 8026, Revised Codes.—State v. Diedtman, 13.

Reputation of Prosecuting Witness—Hearsay.

2. Testimony that the federal Department of Justice and the attorney general of the United States had investigated and passed favorably upon the record of a state witness, an ex-convict and alien enemy employed to detect violations of the sedition statute, was inadmissible as hearsay.—State v. Diedtman, 13.

Cross-examination—Impeachment on Collateral Matter.

3. Where a character witness for defendant had testified that the latter's reputation for honesty and integrity was good, it was error to require him to answer the question on cross-examination whether on previous occasions he had not used language indicating his pro-German sympathies; a witness not being subject to impeachment upon a collateral matter brought out on cross-examination.—State v. Diedtman, 13.

Cross-examination—Collateral Matter—Test.

4. The test by which to determine in a criminal prosecution whether a question asked a witness of defendant on cross-examination relates to a collateral matter on which the witness' answer is conclusive, is whether the state could properly have introduced evidence on the subject in its case in chief.—State v. Diedtman, 13.

Detectives—Cross-examination—Undue Restriction.

5. Where the state's principal witness in a prosecution for sedition, a detective, was an alien enemy, self-confessed forger and ex-convict, who had been in this country but a comparatively brief period, it was prejudicial error to restrict his cross-examination; in such cases a broad liberality of cross-examination should be indulged.—State v. Diedtman, 13.

Contracts—Varying Terms of Writing.

6. Held, that evidence explanatory of the circumstances leading up to the making of a written contract of sale of a cash register with reference to a "special" key attachment, as well as of the conversation had between defendant and plaintiff's agent at the time it was made, was admissible, under section 5036, Revised Codes, and not objectionable as tending to vary the writing.—National Cash Register Co. v. Wall, 60.

Rules of Evidence—Construction.

7. Rules of evidence are not intended to be ironclad, but must be so construed that they will adapt themselves to the varying situations which changing conditions in the business world render imperative.—*Smith v. Sullivan*, 77.

Loose-leaf Ledger—Admissibility.

8. *Held*, that pages of a loose-leaf ledger containing plaintiff's account for work done and supplies furnished, the items having been immediately transferred to the ledger from time cards filled out by the mechanics doing the work and using the supplies, were properly admitted in evidence though the mechanics themselves were not called to testify and their absence was not explained, the book-keeper, however, stating that the ledger was honestly and correctly kept in the regular course of business.—*Smith v. Sullivan*, 77.

Criminal Law—Circumstantial Evidence—Rule.

9. To sustain a conviction on circumstantial evidence the criminatory circumstances must not only be consistent with each other, but must also point clearly to the guilt of the accused, or be inconsistent with any other rational hypothesis.—*State v. Gomez*, 177.

Homicide—Circumstantial Evidence—Insufficiency—Acquittal—Directed Verdict—When Proper.

10. Where, in a prosecution for homicide in which the evidence was entirely circumstantial, some of the circumstances proved, considered apart from the rest of the evidence, tended to incriminate defendant, while others, proof of which could not be questioned, so far explained the criminatory force of the former, that they left no substantial basis for the conclusion of his guilt, it was the duty of the trial judge to direct the jury to return a verdict of not guilty.—*State v. Gomez*, 177.

Erroneous Admission—Curing Error.

11. Error in admitting testimony held to have been cured by striking it from the record and instructing jury to disregard it.—*Sanborn Co. v. Power*, 214.

Checks—Varying Terms of Writings.

12. After a check given in part payment is accepted, it supersedes oral negotiations of the parties to the contract with reference to the payment, and testimony of purported statements concerning it by the maker either before or after its return by the bank to which it was presented for payment but upon which it was not drawn was inadmissible as an attempt to vary the terms of a written instrument. *Montana Livestock etc. Co. v. Stewart*, 221.

Appeal and Error—Admission of Immaterial Evidence—Effect on Judgment.

13. Admission of concededly immaterial evidence is not sufficient to justify reversal of a judgment; such result following only for error materially affecting the appellant's rights on the merits of the case. *Montana Livestock etc. Co. v. Stewart*, 221.

Erroneous Admission of Testimony—Harmless Error.

14. Where the trial court correctly instructed the jury on the measure of damages, error in admitting testimony that the livestock in question had been sold at a figure representing an advance over the contract price was harmless, the witness stating in addition that the reasonable market price of the animals at place of destination was the amount realized on resale.—*Montana Livestock etc. Co. v. Stewart*, 221.

Chattel Mortgages—Impairment of Security—Evidence Inadmissible as Speculative.

15. In an action by the mortgagee of a timber flume to recover damages for its destruction and consequent impairment of his security, testimony offered by him that there was merchantable timber on government land near the flume to cut which he might have secured a contract and thus used the flume and realized a profit, *held* properly excluded as speculative.—*Robinson v. Dover Lumber Co.*, 231.

Conflict—Judgment—Appeal.

16. A judgment on conflicting evidence will not be reversed on appeal.—*Sanborn Co. v. Powers*, 214; *Bank of Commerce v. United States, F. & G. Co.*, 236.

Equity—Admission of Irrelevant Testimony—Presumptions.

17. In an equity case tried to the court, it will be assumed on appeal that incompetent and irrelevant testimony admitted during the course of the trial was disregarded by it in arriving at its decision.—*Lagier v. Lagier*, 267.

General Denial—Evidence Admissible.

18. Under a general denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts, establishment of which is indispensable to his cause of action. *Sell v. Sell*, 329.

Work and Labor—Reasonable Value—Evidence—Sufficiency.

19. In an action on an implied contract for services rendered in taking care of orchard property, where it appeared that he had been paid \$125 a month for like services under a previous contract, and that under a contemplated contract which failed of execution he was to receive \$100 for the same services, a finding by the court in a trial without a jury that \$100 per month was their reasonable value was proper, although plaintiff did not state in his testimony what his services were worth and there was no specific evidence on the question of value.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Same—Value of Services—Trial by Court—Evidence—Inferences.

20. In an action of the nature of the above tried without a jury, the trial judge may properly draw upon his own experience and observation in order to determine what plaintiff's services were reasonably worth, in the absence of specific evidence in that respect.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Physicians and Surgeons—Malpractice—Evidence—Direct Examination—Extracts from Medical Text-books Inadmissible.

21. In an action against a hospital and attending physicians for malpractice it is error to permit counsel for plaintiff to incorporate in his questions to physicians in his case in chief statements from text-books on medical subjects.—*Schumacher v. Murray Hospital*, 447.

Same—X-Ray Photograph—Instruction—Improper Refusal.

22. *Held*, in view of the testimony of plaintiff's expert witnesses as to the circumstances under which they would use the X-ray, that the court erred in refusing defendants' offered instruction to the effect that the jury could not consider any reference to their failure to take an X-ray picture of decedent's hip unless plaintiff had proved that it was usual and customary under the circumstances for ordinarily skillful and careful physicians to take one, and that proof of such failure was not by itself evidence of negligence.—*Schumacher v. Murray Hospital*, 447.

Same—Force of Expert Medical Testimony—Improper Instruction.

23. Defendants' requested instruction that the question whether or not they exercised reasonable and ordinary care and skill in the

treatment of decedent was to be determined from the expert testimony of physicians and surgeons alone, *held* properly refused as taking from the jury consideration of the evidence of lay witnesses concerning conditions upon which their testimony was relevant and material.—*Schumacher v. Murray Hospital*, 447.

Same—Expert Testimony—Proper Instruction.

24. Refusal of defendants' requested instruction that expert testimony based on hypothetical questions is entitled to importance only when fairly given by one properly accredited by his experience and study, *etc.*, *held* improper.—*Schumacher v. Murray Hospital*, 447.

Trial—Cross-examination — Instruction to Disregard Testimony — Proper Refusal, When.

25. Where a party on cross-examination elicits statements in a colloquy with the witness upon a matter not touched upon in his direct examination, he is in no position to complain of the trial court's refusal to instruct the jury to disregard it.—*Schumacher v. Murray Hospital*, 447.

Criminal Law—Hearsay Testimony—Inadmissibility—Curing Error.

26. Error committed in permitting an officer to testify to a conversation had with one D., charged jointly with defendant for gambling but not on trial with him, relative to defendant's intention to open a gambling-room, without anything to show a conspiracy between defendant and D., *held* to have been cured by subsequent testimony of D. that defendant had told him that he intended to open such a room.—*State v. Teubner*, 482.

Insurance—Burden of Proof—Rebuttal—Presumptions.

27. In an action on an accident insurance policy, the burden was upon plaintiff to show that death was caused by external, violent and accidental means; whereupon, to defeat liability under the policy, it was incumbent on the defendant to rebut the case thus made, the presumption being that the shot was fired by decedent's wife accidentally and not with intent to murder.—*Withers v. Pacific Mutual Life Ins. Co.*, 485.

Same—*Prima Facie* Case—Directed Verdict—When Proper.

28. *Held*, that plaintiff's evidence simply showing that deceased died on a certain day from a wound in the neck caused by a bullet from a revolver fired by his wife, was sufficient to make out a *prima facie* case, and that, in the absence of evidence on the part of defendant, the court was warranted in directing a verdict for plaintiff.—*Withers v. Pacific Mutual Life Ins. Co.*, 485.

***Prima Facie* Case Made by Plaintiff—Duty of Defendant.**

29. Where plaintiff has made a *prima facie* case, the defendant must rebut it or fail in the action.—*Withers v. Pacific Mutual Life Ins. Co.*, 485.

Attorney and Client—Fees—Evidence—Admissibility.

30. In an action to recover attorney's fees, admission in evidence of the *remittitur* from the supreme court in a cause in which plaintiff claimed to have rendered services after remand to the district court was proper for the purpose of showing the necessity for legal services after the case was sent back.—*Baldwin v. Silver*, 495.

Motion to Strike as not Responsive—Proper Denial.

31. Where the major portion of the answer of a witness was responsive to a question propounded to him on cross-examination, a motion to strike out the whole answer as not responsive was properly denied, it having been incumbent upon counsel to point out the portion not deemed responsive.—*Baldwin v. Silver*, 495.

Attorney and Client—Fees—Account Stated—Admissibility in Evidence.

32. An account rendered to and received by defendant showing charges for legal services in a larger amount than that testified to by defendant as having been agreed upon by the parties, *held* admissible in rebuttal.—*Baldwin v. Silver*, 495.

Account Stated—Retention Without Objection—Effect.

33. The retention of an account stated for an unreasonable length of time by a debtor without objection is evidence of his assent to its correctness.—*Baldwin v. Silver*, 495.

Offer of Proof—Proper Rejection as Repetition.

34. Defendant's offer of proof, in surrebuttal, covering a point previously testified to by him, was properly rejected as repetition.—*Baldwin v. Silver*, 495.

Judicial Notice—Statutes of Other States.

35. Where rights are based upon statutes of another state, the statutes must be pleaded and proved, since courts of this state cannot take judicial notice of statutes of sister states.—*In re Estate of Bruhns*, 526.

Stipulations—Binding on Courts and Parties.

36. Courts, as well as the parties entering into it, are bound by the provisions of a stipulation that certain alleged facts shall be deemed proven, so long as it remains in force; hence admission of evidence having a tendency to disprove what was by the stipulation judicially admitted, was error.—*Lewis v. Lambros*, 555.

Evidence—Sufficiency—Verdict.

37. A verdict based upon evidence which from any point of view could have been accepted as credible by the jury is binding upon the supreme court even though to it it may appear inherently weak.—*Williams v. Thomas*, 576.

Weight of Uncorroborated Testimony—Instructions—Proper Refusal.

38. Refusal of an instruction to the effect that the uncorroborated testimony of a witness is insufficient in law to prove a fact was proper, under section 7861, Revised Codes.—*Williams v. Thomas*, 576.

Testimony Impeaching Witness—When Proper.

39. Testimony as to alleged statements of plaintiff tending to discredit his statements on the stand, *held* properly admitted, the proper foundation having been laid, and the evidence tending to impeach plaintiff.—*Beadle v. Harrison*, 606.

Malicious Prosecution—Evidence—Inadmissibility.

40. The defendant in an action for malicious prosecution may not be permitted to testify that he disclosed to an officer all the facts and circumstances out of which the criminal prosecution against plaintiff arose, without stating what they were.—*Beadle v. Harrison*, 606.

Same—Erroneous Admission—Harmless Error.

41. Error in permitting defendant in action for malicious prosecution to state generally that he made a full and fair disclosure of the facts to a justice of the peace, without stating what they were, was harmless where it appeared that arrest was not made pursuant to any statement so made, but that proceedings before the justice were abandoned and a new action instituted after consultation with the county attorney.—*Beadle v. Harrison*, 606.

Same—Good Faith in Instituting Criminal Action.

42. A question asked defendant whether at the time he made complaint to a justice of the peace and interviewed the county attorney relative to the larceny of a horse by plaintiff in an action for mali-

cious prosecution, he believed in good faith that the latter had stolen the animal, was not objectionable as calling for a conclusion.—*Beadle v. Harrison*, 606.

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46. The jury in a criminal cause in which circumstantial evidence is relied upon must draw its conclusions from the circumstances as a whole, and not from any single fact in evidence.—*State v. Francis*, 659.

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Exception once saved is saved for all purposes during trial,—see *Pleading and Practice*, 29.

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See, also, *Workmen's Compensation*, 5.

Workmen's Compensation—Findings of District Court—When Conclusive.

1. On appeal from an award made under the Compensation Act, after review by the district court, the supreme court will not reverse the findings of that court unless the evidence clearly preponderates against them.—*Willis v. Pilot Butte Mining Co.*, 26.

Unsupported by Evidence—Judgment—Reversal.

2. A judgment based upon a finding unsupported by evidence will be reversed.—*Tuttle v. Pacific Mutual Life Ins. Co.*, 121.

Special Findings—Rendition.

3. Where in an action at law the court directs the jury to return a special verdict or special findings, it is its duty to render the proper judgment in open court, the announcement of its decision and

DURESS.

Release from payment of promissory note,—see Promissory Notes, 1, 2

EJECTMENT.

See Boundaries.

ELECTION OF REMEDIES.

See Pleading and Practice, 32.

ELECTIONS.

Mandamus—Right of Political Party to have Names of Candidates for Presidential Electors Appear upon Ballot.

1. *Held*, on application for writ of mandate, that while a political party not in existence at the time the primary election for presidential and vice-presidential primary election was held was entitled to have the names of its candidates for these offices placed upon the ballot under the provisions of section 521, Revised Codes, one in existence at that time had no such right.—State ex rel. Richardson v. Stewart, 707; State ex rel. Williams v. Stewart, 708.

ESTATES OF DECEASED PERSONS.

Testamentary Trusts—Termination—Exclusive Jurisdiction.

1. *Held*, that section 7698, Revised Codes, confers exclusive jurisdiction upon the district court when sitting as a probate court, to determine whether the purpose of a testamentary trust has been accomplished, wherever it has acquired jurisdiction of the estate by probate of the will which has created a trust to continue after final distribution.—State ex rel. Philbrick v. District Court, 376.

Same.

2. Since section 7698, Revised Codes, affords a plain, speedy and adequate remedy for the termination of testamentary trusts in probate proceedings then pending before the district court, a demurrer to a complaint in equity seeking the same relief was properly sustained and the cause dismissed.—State ex rel. Philbrick v. District Court, 376.

Same—Wills—Construction.

3. A will under which all of testator's estate was bequeathed to one of his sisters to be held in trust for another who was to receive a stated amount each year for life, the trustee to have what remained at the death of the beneficiary, construed, and *held* that it was the intention of the testator that the trust should continue during the life of the beneficiary and that therefore the latter, as only heir of the trustee, was not entitled to have the entire estate delivered to her on the death of the trustee.—State ex rel. Philbrick v. District Court, 376.

Probate Courts—Residence of Decedent in Other State—Distribution of Estate in This and Sister State.

4. An intestate died in California leaving property there of the value of less than \$1,500, and also property in this state; the probate court of California distributed all of the property there situated to the widow; the court in Montana, in proceedings not intended as ancillary to those had in California, and regardless of what she had received in that state, awarded to her one-third of

the Montana property and two-thirds to the children. *Held*, that the decree was correct as in accordance with statute.—In re Estate of Bruhns, 526.

Same—Jurisdiction not Extraterritorial.

5. Jurisdiction of district courts in this state in probate matters pertaining to real property is confined to property situated within its boundaries, any order or decree affecting realty in another state being a nullity.—In re Estate of Bruhns, 526.

Probate Courts of Other States—Decrees—Presumptions.

6. A decree made by a court of another state in a probate proceeding will be presumed to have been made within jurisdiction and in accordance with its laws, and is conclusive upon courts of this state in every matter in which it is conclusive in the foreign state.—In re Estate of Bruhns, 526.

ESTOPPEL.

See, also, Contempt, 16.

Deeds—Description of Property.

1. Where a railway company seeking to obtain a right of way furnished the data, including the right of way map, from which the description in a deed to the railroad was obtained, the company was estopped to say that it did not intend that the description in the deed should operate to convey the ground shown upon the map.—Cobban Realty Co. v. Chicago etc. Ry. Co., 188.

Destroying Mortgage Security—What not Defense.

2. Where mortgaged property is injured or its value lessened, the wrongdoer is liable to the mortgagee and may not be heard to justify his wrongful act by invoking the provisions of a contract under which the property would have become the property of another in the event of a certain contingency.—Robison v. Dover Lumber Co., 231.

Cities and Towns—Taxation—Special Improvement Districts—Right to Object.

3. Failure of an owner of town property to make protest to the creation of a special improvement district comprising an area of 14,000 square feet did not estop him from thereafter complaining of the inclusion of an additional area of equal extent made without his knowledge or consent, and of the proportionate increase in his tax.—Pool v. Town of Townsend, 297.

Corporations—Power of Secretary to Make Contracts.

4. Generally speaking, the secretary of a corporation has no implied authority, as an incident to his office, to contract for his corporation; but where the corporation conducts its affairs in such a way as to induce those who deal with it to act upon the assumption that he has authority to bind it as its general agent, it is precluded, upon the principle of estoppel, to assert that he was without power to do the act for which it is sought to be held liable.—Hopkins v. Paradise Heights F. G. Assn., 404.

Sales—Rescission.

5. Where a buyer of farm machinery continued in possession thereof and operated it for practically three seasons and up to the time the seller brought action to recover the purchase price, the former was estopped to claim rescission of the contract for failure of consideration.—Advance-Rumely Threshing Co. v. Terpening, 507.

Chattel Mortgages—Impairment of Security—Evidence Inadmissible as Speculative.

15. In an action by the mortgagee of a timber flume to recover damages for its destruction and consequent impairment of his security, testimony offered by him that there was merchantable timber on government land near the flume to cut which he might have secured a contract and thus used the flume and realized a profit, *held* properly excluded as speculative.—*Robinson v. Dover Lumber Co.*, 231.

Conflict—Judgment—Appeal.

16. A judgment on conflicting evidence will not be reversed on appeal.—*Sanborn Co. v. Powers*, 214; *Bank of Commerce v. United States, F. & G. Co.*, 236.

Equity—Admission of Irrelevant Testimony—Presumptions.

17. In an equity case tried to the court, it will be assumed on appeal that incompetent and irrelevant testimony admitted during the course of the trial was disregarded by it in arriving at its decision.—*Lagier v. Lagier*, 267.

General Denial—Evidence Admissible.

18. Under a general denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts, establishment of which is indispensable to his cause of action. *Sell v. Sell*, 329.

Work and Labor—Reasonable Value—Evidence—Sufficiency.

19. In an action on an implied contract for services rendered in taking care of orchard property, where it appeared that he had been paid \$125 a month for like services under a previous contract, and that under a contemplated contract which failed of execution he was to receive \$100 for the same services, a finding by the court in a trial without a jury that \$100 per month was their reasonable value was proper, although plaintiff did not state in his testimony what his services were worth and there was no specific evidence on the question of value.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Same—Value of Services—Trial by Court—Evidence—Inferences.

20. In an action of the nature of the above tried without a jury, the trial judge may properly draw upon his own experience and observation in order to determine what plaintiff's services were reasonably worth, in the absence of specific evidence in that respect.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Physicians and Surgeons—Malpractice—Evidence—Direct Examination—Extracts from Medical Text-books Inadmissible.

21. In an action against a hospital and attending physicians for malpractice it is error to permit counsel for plaintiff to incorporate in his questions to physicians in his case in chief statements from text-books on medical subjects.—*Schumacher v. Murray Hospital*, 447.

Same—X-Ray Photograph—Instruction—Improper Refusal.

22. *Held*, in view of the testimony of plaintiff's expert witnesses as to the circumstances under which they would use the X-ray, that the court erred in refusing defendants' offered instruction to the effect that the jury could not consider any reference to their failure to take an X-ray picture of decedent's hip unless plaintiff had proved that it was usual and customary under the circumstances for ordinarily skillful and careful physicians to take one, and that proof of such failure was not by itself evidence of negligence.—*Schumacher v. Murray Hospital*, 447.

Same—Force of Expert Medical Testimony—Improper Instruction.

23. Defendants' requested instruction that the question whether or not they exercised reasonable and ordinary care and skill in the

Rules of Evidence—Construction.

7. Rules of evidence are not intended to be ironclad, but must be so construed that they will adapt themselves to the varying situations which changing conditions in the business world render imperative.—*Smith v. Sullivan*, 77.

Loose-leaf Ledger—Admissibility.

8. *Held*, that pages of a loose-leaf ledger containing plaintiff's account for work done and supplies furnished, the items having been immediately transferred to the ledger from time cards filled out by the mechanics doing the work and using the supplies, were properly admitted in evidence though the mechanics themselves were not called to testify and their absence was not explained, the bookkeeper, however, stating that the ledger was honestly and correctly kept in the regular course of business.—*Smith v. Sullivan*, 77.

Criminal Law—Circumstantial Evidence—Rule.

9. To sustain a conviction on circumstantial evidence the criminatory circumstances must not only be consistent with each other, but must also point clearly to the guilt of the accused, or be inconsistent with any other rational hypothesis.—*State v. Gomez*, 177.

Homicide — Circumstantial Evidence — Insufficiency — Acquittal — Directed Verdict—When Proper.

10. Where, in a prosecution for homicide in which the evidence was entirely circumstantial, some of the circumstances proved, considered apart from the rest of the evidence, tended to incriminate defendant, while others, proof of which could not be questioned, so far explained the criminatory force of the former, that they left no substantial basis for the conclusion of his guilt, it was the duty of the trial judge to direct the jury to return a verdict of not guilty.—*State v. Gomez*, 177.

Erroneous Admission—Curing Error.

11. Error in admitting testimony held to have been cured by striking it from the record and instructing jury to disregard it.—*Sanborn Co. v. Power*, 214.

Checks—Varying Terms of Writings.

12. After a check given in part payment is accepted, it supersedes oral negotiations of the parties to the contract with reference to the payment, and testimony of purported statements concerning it by the maker either before or after its return by the bank to which it was presented for payment but upon which it was not drawn was inadmissible as an attempt to vary the terms of a written instrument. *Montana Livestock etc. Co. v. Stewart*, 221.

Appeal and Error—Admission of Immaterial Evidence—Effect on Judgment.

13. Admission of concededly immaterial evidence is not sufficient to justify reversal of a judgment; such result following only for error materially affecting the appellant's rights on the merits of the case. *Montana Livestock etc. Co. v. Stewart*, 221.

Erroneous Admission of Testimony—Harmless Error.

14. Where the trial court correctly instructed the jury on the measure of damages, error in admitting testimony that the livestock in question had been sold at a figure representing an advance over the contract price was harmless, the witness stating in addition that the reasonable market price of the animals at place of destination was the amount realized on resale.—*Montana Livestock etc. Co. v. Stewart*, 221.

Attorney and Client—Fees—Account Stated—Admissibility in Evidence.

32. An account rendered to and received by defendant showing charges for legal services in a larger amount than that testified to by defendant as having been agreed upon by the parties, *held* admissible in rebuttal.—Baldwin v. Silver, 495.

Account Stated—Retention Without Objection—Effect.

33. The retention of an account stated for an unreasonable length of time by a debtor without objection is evidence of his assent to its correctness.—Baldwin v. Silver, 495.

Offer of Proof—Proper Rejection as Repetition.

34. Defendant's offer of proof, in surrebuttal, covering a point previously testified to by him, was properly rejected as repetition.—Baldwin v. Silver, 495.

Judicial Notice—Statutes of Other States.

35. Where rights are based upon statutes of another state, the statutes must be pleaded and proved, since courts of this state cannot take judicial notice of statutes of sister states.—*In re Estate of Bruhns*, 526.

Stipulations—Binding on Courts and Parties.

36. Courts, as well as the parties entering into it, are bound by the provisions of a stipulation that certain alleged facts shall be deemed proven, so long as it remains in force; hence admission of evidence having a tendency to disprove what was by the stipulation judicially admitted, was error.—Lewis v. Lambros, 555.

Evidence—Sufficiency—Verdict.

37. A verdict based upon evidence which from any point of view could have been accepted as credible by the jury is binding upon the supreme court even though to it it may appear inherently weak.—Williams v. Thomas, 576.

Weight of Uncorroborated Testimony—Instructions—Proper Refusal.

38. Refusal of an instruction to the effect that the uncorroborated testimony of a witness is insufficient in law to prove a fact was proper, under section 7861, Revised Codes.—Williams v. Thomas, 576.

Testimony Impeaching Witness—When Proper.

39. Testimony as to alleged statements of plaintiff tending to discredit his statements on the stand, *held* properly admitted, the proper foundation having been laid, and the evidence tending to impeach plaintiff.—Beadle v. Harrison, 606.

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2. A judgment based upon a finding unsupported by evidence will be reversed.—*Tuttle v. Pacific Mutual Life Ins. Co.*, 121.

Special Findings—Rendition.

3. Where in an action at law the court directs the jury to return a special verdict or special findings, it is its duty to render the proper judgment in open court, the announcement of its decision and

the entry of it in the minutes constituting the rendition of the judgment.—*McIntyre v. Northern Pac. Ry. Co.*, 256.

Evidence—Insufficiency—Scope of Review.

4. On appeal, in an equity case, from the judgment only, the supreme court will go no further, in disposing of the assignment that the evidence is insufficient to support the findings, than to ascertain whether there is substantial evidence to support them.—*Babcock v. Engel*, 597.

Appeal and Error—When not Conclusive.

5. *Held*, that the rule under which the supreme court will not reverse the findings of the district court except where the evidence clearly preponderates against them does not obtain where the findings were made by the district court upon the same record presented for review on appeal, since then the appellate court is in as advantageous a position to determine their correctness as was the trial court in making them.—*Morgan v. Butte Central Min. etc. Co.*, 633.

FORFEITURES.

See Insurance, 9, 10, 11.

FRAUD.

Essentials.

1. To make out a case for relief on the ground of fraud, it must appear that the party against whom the fraud is alleged made a misrepresentation of a material fact, with intent to induce the other party to act upon it, and that the latter believed, and relied and acted upon it to his damage.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

What Does not Constitute.

2. A misrepresentation or opinion expressed by one to another as to the law relative to their respective rights in the matter which is the subject of negotiations is not a fraudulent misrepresentation.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

Misrepresentation as to Law—When Fraud.

3. If a relation of trust and confidence exists between parties, a misrepresentation or opinion by the party in whom the trust and confidence is reposed as to what the law is, if made for the purpose of deceiving the other or gaining an unconscionable advantage over him, constitutes a ground for relief.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

Same.

4. If one who knows the law deceives another by misrepresenting it to him and, knowing him to be ignorant of it, takes advantage of him by reason of his ignorance, an action for fraud lies.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

Expression of Opinion.

5. A statement merely as to what the party making it intends to do is not a misrepresentation, since it is not an affirmation of a fact but only an assertion of a present mental condition or opinion existing in him.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

What not Fraudulent Representation.

6. A representation by the agent (an attorney) of plaintiff implement company, chattel mortgagee, to the mortgagor's widow and executrix that if she refused to give additional security the mortgage would be foreclosed and certain of her own property taken to

satisfy it, was merely the statement of an intention and not the affirmation of a fact, did not amount to a fraudulent representation, though the maker of it must have known that the latter part thereof could not be carried out, a fiduciary relation not existing between him and her, and was insufficient to invalidate a mortgage thereafter given by her on the ground of fraud.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

Same.

7. The statement by plaintiff's agent in endeavoring to persuade defendant to furnish additional security for a chattel mortgage theretofore executed by her deceased husband, that he could not see why she, apparently capable of taking care of her own business, needed anybody's advice, was a mere expression of his opinion as to her business capacity, and not one upon which to base a charge of fraud.—*Emerson-Brantingham Implement Co. v. Anderson*, 617.

Same.

8. Where a testator's will provided that his widow, and executrix, should have full power to sell and dispose of his property for any purpose without order of court, a representation by plaintiff's agent (an attorney) that she had such power, being true, could not be characterized as fraudulent.—*Emerson-Brantingham Imp. Co. v. Anderson*, 617.

FUGITIVES FROM JUSTICE.

Motion for new trial,—see Criminal Law, 32.

FUNDING BONDS.

Validity,—see Cities and Towns, 29, 30.

GAMING.

See Criminal Law, 17.

GOVERNMENT.

Primary Purpose.

1. The primary purpose of government is maintenance of peace and social order.—*Butte Miners' Union v. City of Butte*, 391.

GUARANTY.

See Sureties.

HARMLESS ERROR.

Admission of evidence,—see Evidence, 26, 41.

See Appeal and Error, 1, 4, 10, 11.

HIGHWAYS.

Injunction Against Closing—Right of Action.

1. If one's land is so situated that he cannot gain ingress or egress for the purposes of cultivation and caring for his livestock, without the use of a road sought to be closed, he has such a special and vital interest in keeping it open, not shared by the public, as entitles him to maintain an action to enjoin its closing.—*State ex rel. Dansie v. Nolan*, 167.

Public Lands—Nature of Grant of Right of Way.

2. *Held*, that the grant of a right of way for the construction of a highway over public lands not reserved for public use, made by

section 2477, U. S. Rev. Stats., is not one *in praesenti*, but is no more than an offer of so much land as may be necessary for the purpose of a right of way, and takes effect or becomes fixed only when a highway is definitely established or constructed in some one of the modes authorized by the laws of the state, *inter alia* by user by the public of the exact route confined to the statutory width of a highway for the period of the statute of limitations as to lands, *i. e.*, ten years.—State ex rel. Dansie v. Nolan, 167.

User—What Insufficient.

3. The mere casual journeying by stockmen, trappers and settlers over what was thereafter claimed to have become a right of way for a public road was insufficient to constitute the trail thereby made a public highway by user.—State ex rel. Dansie v. Nolan, 167.

Same—Evidence—Insufficiency.

4. Evidence that a road over public lands had been used "since the early '90's" was not sufficient to establish a right by user prior to July 1, 1895.—State ex rel. Dansie v. Nolan, 167.

HOMICIDE.

See Criminal Law, 14, 15, 23-32.

HUSBAND AND WIFE.

Right of divorced woman to redeem land sold under foreclosure,—see Mortgages, 7.

Marriage—Annulment—Alimony—Extent of Power of District Court.

1. In annulment proceedings the trial court may allow defendant wife temporary alimony, suit money and attorney's fees to enable her to defend, its power in that behalf continuing while the validity of the marriage remains in doubt, that is, while the suit is pending, whether in the district court or in the supreme court on appeal, and ending on entry of final decree in favor of plaintiff.—McMurray v. McMurray, 229.

Divorce—Evidence—Sufficiency—Review—Rule in Equity Cases.

2. Where, in a divorce proceeding, the trial court made no specific findings of fact but rendered a general decree in favor of plaintiff to the effect that all three charges alleged in her complaint were true, and the evidence was sufficient to sustain the court's view as to one of such charges, the supreme court will not interfere on appeal, even though as to the other two the proof could properly be said to preponderate against its decision.—Lagier v. Lagier, 267.

Same—Remarriage—Effect—Jurisdiction of Supreme Court.

3. Since the supreme court has no original jurisdiction in divorce proceedings, it cannot reverse a decree in such a case on the ground that after its rendition, and before defendant had perfected his appeal, plaintiff had remarried,—a fact, made to appear by stipulation on appeal, the legal effect of which could not have been before the trial court when it rendered its decree.—Lagier v. Lagier, 267.

Same—Laxity of Divorce Laws—Remedy.

4. The remedy for laxity of divorce laws lies with the legislative, not the judicial, branch of government.—Lagier v. Lagier, 267.

Same—Custody of Minors Pendente Lite—Removal from Jurisdiction—Supervisory Control.

5. *Held*, that where defendant wife in a divorce proceeding had been awarded the custody of a minor child pending determination of the action with the restriction that the child be kept within the

of an informal conversation.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Waiver.

3. Where an insurance policy contains a provision against waiver by an agent of the insurer, it is both notice to and agreement by the policy-holder that no agent has authority to waive any of its conditions.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Waiver—What Does not Constitute.

4. Letters in which insurer, among other things, denied liability on the ground that the requirement as to notice had not been met and in which it was expressly stated that nothing therein was to be construed as a waiver, *held* incapable of construction as a waiver.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Waiver—Unreasonable Provision.

5. *Quaere*: Is a provision in an insurance policy that no waiver shall be valid unless in writing from the home office and signed by its president or vice-president, and the secretary or assistant secretary, a reasonable one?—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Manner of Death—Burden of Proof.

6. In an action to recover on a policy under which the liability of the insurer is specifically limited to insurance against death by accident resulting from bodily injuries and caused solely by external, violent and accidental means, independent of all other causes, within ninety days after the injury, the plaintiff has the burden of proving not only that death ensued, but also that it was caused as provided in the policy and occurred within the time limited after the injury.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—"Accidental" Death—Definition.

7. Where, in the act which precedes an injury resulting in death, something unforeseen or unusual occurs which produces the injury, the injury is accidental within the meaning of an accident policy; death resulting from voluntary physical exertion, from intentional acts of the insured, from disease, or from the vicissitudes of climate or atmosphere not falling within the definition.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Accidental Death of Insured—Evidence—Insufficiency.

8. Evidence that insured who, while on a hunting trip, left camp in a snowstorm and perished, his remains being found about three years thereafter, two miles from camp, at a place where he could not have fallen to his death, his rifle not being near the body and a pistol being in his pocket, *held* to have been insufficient to show that death resulted from external, violent and accidental means within the meaning of an accident insurance policy, there being no presumption that he met death by such means.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Life Insurance—Time Essence of Contract—Forfeiture.

9. Time is of the essence of all insurance contracts, and failure to pay the premium when due, or of any installment thereof, works a forfeiture, unless by a course of dealing with the insured the insurer has evinced an intention to waive strict compliance.—*Nelson v. Mutual Life Ins. Co.*, 153.

Same—Forfeiture—Waiver—Burden of Proof.

10. Where plaintiff in an action on a life insurance pleaded reinstatement after forfeiture resultant from nonpayment of an installment of the premium, asserting that the insurer waived the provision of the contract which required the insured to furnish a cer-

section 2477, U. S. Rev. Stats., is not one *in praesenti*, but is no more than an offer of so much land as may be necessary for the purpose of a right of way, and takes effect or becomes fixed only when a highway is definitely established or constructed in some one of the modes authorized by the laws of the state, *inter alia* by user by the public of the exact route confined to the statutory width of a highway for the period of the statute of limitations as to lands, *i. e.*, ten years.—State ex rel. Dansie v. Nolan, 167.

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See Criminal Law, 14, 15, 23–32.

HUSBAND AND WIFE.

Right of divorced woman to redeem land sold under foreclosure,—see Mortgages, 7.

Marriage—Annulment—Alimony—Extent of Power of District Court.

1. In annulment proceedings the trial court may allow defendant wife temporary alimony, suit money and attorney's fees to enable her to defend, its power in that behalf continuing while the validity of the marriage remains in doubt, that is, while the suit is pending, whether in the district court or in the supreme court on appeal, and ending on entry of final decree in favor of plaintiff.—McMurray v. McMurray, 229.

Divorce—Evidence—Sufficiency—Review—Rule in Equity Cases.

2. Where, in a divorce proceeding, the trial court made no specific findings of fact but rendered a general decree in favor of plaintiff to the effect that all three charges alleged in her complaint were true, and the evidence was sufficient to sustain the court's view as to one of such charges, the supreme court will not interfere on appeal, even though as to the other two the proof could properly be said to preponderate against its decision.—Lagier v. Lagier, 267.

Same—Remarriage—Effect—Jurisdiction of Supreme Court.

3. Since the supreme court has no original jurisdiction in divorce proceedings, it cannot reverse a decree in such a case on the ground that after its rendition, and before defendant had perfected his appeal, plaintiff had remarried,—a fact, made to appear by stipulation on appeal, the legal effect of which could not have been before the trial court when it rendered its decree.—Lagier v. Lagier, 267.

Same—Laxity of Divorce Laws—Remedy.

4. The remedy for laxity of divorce laws lies with the legislative, not the judicial, branch of government.—Lagier v. Lagier, 267.

Same—Custody of Minors Pendente Lite—Removal from Jurisdiction—Supervisory Control.

5. *Held*, that where defendant wife in a divorce proceeding had been awarded the custody of a minor child pending determination of the action with the restriction that the child be kept within the

jurisdiction of the court, which order was subsequently modified so as to permit her to take it to a city outside the state on her promise to return it for trial of the cause, the order was properly annulable under the supervisory control power of the supreme court, since the district court would be in no position to enforce any subsequent order it might make in case defendant did not keep her promise to return to the jurisdiction with the child.—State ex rel. Cash v. District Court, 316.

Same—Dismissal or Nonsuit—When Proper—Affirmative Relief to Defendant—When Unwarranted.

6. The failure of the plaintiff in a suit for divorce to be present at the trial or offer any evidence in support of the allegations of her complaint which were put in issue by the answer constituted an abandonment of her cause and authorized the court to render a judgment of dismissal or nonsuit, but, in the absence of a counterclaim, or new matter in the answer constituting a defense warranting it, it could not grant affirmative relief to defendant.—Sell v. Sell, 329.

Same—Complaint—Necessary Allegation.

7. An allegation in plaintiff's complaint in an action for divorce that at the time of its commencement the parties were husband and wife was indispensable to a statement of a cause of action.—Sell v. Sell, 329.

Same—Judgment of Nonmarriage—When Improper.

8. *Held*, that since it was necessary for plaintiff in her action for divorce to allege and prove the existence of the marriage, evidence that the parties were never married was admissible under defendant's denial of such allegation, and that therefore his subsequent affirmative allegation of nonmarriage did not constitute new matter upon which he could be granted affirmative relief to the effect that the parties never sustained the relation of husband and wife.—Sell v. Sell, 329.

Same—Common-law Action for Jactitation of Marriage Does not Lie.

9. Power to decree a divorce is statutory, and since ample provision is made by the Codes for the protection of the marital relation, including an action to establish marriage when either party denies its existence, an action under common-law procedure for jactitation of marriage under which a party wrongfully claiming that a marriage exists may be enjoined from so proclaiming to others does not obtain in Montana.—Sell v. Sell, 329.

Same—Failure to Pay Alimony—Contempt—Supervisory Control—Writ Does not Lie, When.

10. The writ of supervisory control does not lie to relieve one from punishment under an order finding him guilty of contempt for failure to pay temporary alimony, where he neither made application for a modification or revocation of, nor appealed from, the order awarding the alimony.—State ex rel. Scott v. District Court, 353.

Same—Alimony—Contempt—When Inability to Comply not Defense.

11. Inability to comply with an order awarding alimony *pendente lite* was no defense to a charge of contempt where, after the court had adjudicated his ability to pay, contemnor voluntarily encumbered the property disclosed to the court, and thus put it out of his power to comply with the order.—State ex rel. Scott v. District Court, 353.

Same—Defense—Estoppel.

12. The record not disclosing under what representations and circumstances the wife of contemnor signed the mortgage referred to

above, the contention that she was estopped to claim that by mortgaging his property he purposely disabled himself from complying with the court's order directing payment of temporary alimony to her *held* without merit.—State ex rel. Scott v. District Court, 353.

Same—When Order Committing Contemnor to Jail Void.

13. *Held*, on supervisory control, that the authority of the district court to commit a contemnor to jail until its order directing him to pay temporary alimony should be complied with was, under section 7319, Revised Codes, contingent upon a showing that it was within his power to comply, and that, therefore, the record showing that at the time of his commitment he was financially unable to obey the order, his commitment was void.—State ex rel. Scott v. District Court, 353.

Goods, Wares and Merchandise—When Wife not Liable.

14. In an action against husband and wife on an account stated for goods, wares and merchandise, where nothing appeared in the complaint or otherwise that the articles were of the character mentioned in section 3707, Revised Codes, for which the separate property of the wife was liable, no account was stated as to her and a judgment against her was therefore unwarranted.—O'Hanlon Co. v. Jess, 415.

INDEBTEDNESS.

Public,—see Cities and Towns, 11-16, 29, 30.

INDUSTRIAL ACCIDENT BOARD.

See Workmen's Compensation.

INFERENCES.

See Evidence, 20; Pleading and Practice, 19, 36, 37.

INFORMATIONS.

Appeal from order sustaining demurrer—Record on appeal,—see Appeal and Error, 20.

Insufficiency—Methods of objection,—see Criminal Law, 18.

Interpretation—Inferences not permissible,—see Criminal Law, 19.

Uncertainty—Fatal defect,—see Criminal Law, 20.

Sedition—May be charged how,—see Criminal Law, 21.

INJUNCTION.

Highways—Injunction Against Closing—Right of Action.

1. If one's land is so situated that he cannot gain ingress or egress for the purposes of cultivation and caring for his livestock, without the use of a road sought to be closed, he has such a special and vital interest in keeping it open, not shared by the public, as entitles him to maintain an action to enjoin its closing.—State ex rel. Dansie v. Nolan, 167.

Cities and Towns—Taxation—Judgment Too Broad, When.

2. Where only a portion of a special improvement tax was illegal because imposed upon land not within the town limits at the time the district was created, a judgment enjoining the collection of the entire tax, part of which was on property properly included in the district and therefore justly due, was too broad; judgment therefore modified to apply to only that portion illegally imposed.—Pool v. Town of Townsend, 297.

Temporary Injunction—Effect of General Order Dissolving.

3. A general order of the district court dissolving a temporary injunction was in effect a finding in favor of defendants upon all material matters in dispute and conclusive on appeal, the evidence not preponderating against it.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

Same—Does not Lie for What Purpose.

4. Injunction does not lie to oust one from and place another in possession of lands.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

Same—Motion to Dissolve—Theory of Case—Appeal.

5. Where plaintiffs asked for the dissolution of a temporary injunction on the ground that they were and defendant was not entitled to possession of the lands in controversy and assumed the burden of showing that they were entitled to the injunction, they could not on appeal change their theory and urge that the trial court erred in not modifying and continuing it in force as to the lands held by plaintiff under an alleged lease.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

Same—Motion to Dissolve—Question for Decision.

6. On motion to dissolve an injunction before trial upon the merits, the question before the court is whether, upon all the facts disclosed at the hearing, the court should have granted the injunction in the first instance.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

Same—Motion to Dissolve—Assumption of Burden of Proof—Failure to Sustain Burden—Appeal—Theory of Case.

7. Where plaintiffs, on the hearing of defendant's motion to dissolve a temporary restraining order, voluntarily assumed the burden of showing that they were the owners in fee of lands, the crops growing on which defendant claimed under an alleged lease, and that therefore they were entitled to the injunction, they were responsible for uncertainty in the evidence respecting the issue, and in no position to urge on appeal that the injunction should have been modified instead of dissolved.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

Same—Motion to Dissolve—Merits of Case not to be Determined.

8. On motion to dissolve a temporary restraining order, it is not the province of the district court, nor that of the supreme court on appeal from an order dissolving it, to determine finally any matter which may arise upon a trial of the merits of the case in which it was issued.—*Blinn v. Hutterische Society of Wolf Creek*, 542.

INSANITY.

See Criminal Law, 22, 27, 29, 31.

INSOLVENCY.

See Bankruptcy, 1-3.

INSTRUCTIONS.**Sedition—Issues—Definition.**

1. Failure of the trial court to define the issues involved in a prosecution for sedition in its instructions to the jury, or to advise them that it was necessary to a conviction that the state prove beyond a reasonable doubt that defendant uttered the objectionable language and that such language was calculated to have the effect charged

that he was insane when he committed the homicide for which he was on trial the burden then shifted to the state to establish his sanity, failure to give a separate instruction to that effect was not reversible error.—State v. Colbert, 584.

Criminal Law—Preponderance of Evidence—Error.

19. An instruction on "preponderance of the evidence" has no place in a criminal trial, the defendant being required to do no more in the way of evidence in his behalf than introduce sufficient to raise a reasonable doubt of his guilt.—State v. Francis, 659.

Same—Circumstantial Evidence—To be Viewed as a Whole.

20. An instruction offered by defendant on the law of circumstantial evidence to the effect that if there was any single fact proved to the satisfaction of the jury inconsistent with his guilt, acquittal should follow, was correctly refused, since the jury must draw its conclusion from the circumstances relied upon for conviction as a whole, and if then they are inconsistent with any rational hypothesis other than his guilt, a verdict of guilty may follow.—State v. Francis, 659.

Same—Failure of Defendant to Offer Proper Instruction—Effect.

21. Under section 9271, Revised Codes, it was the duty of defendant to offer a correct instruction on the law of circumstantial evidence, failing in which he was in no position to complain of omission to instruct the jury on that point.—State v. Francis, 659.

Same—Circumstantial Evidence—When Instruction Required—Theory of Case.

22. The necessity for an instruction on circumstantial evidence arises only in cases depending entirely on such evidence; hence where counsel for defendant conceded on the trial that it was not the theory of the defense that the case depended upon circumstantial evidence alone, refusal of an instruction was not error.—State v. Francis, 659.

Same—Failure to Offer Instruction—Presumptions.

23. Defendant, not having offered an instruction as to the purpose for which certain testimony had been received, must be presumed to have been satisfied that none was necessary, and was therefore in no position to complain of failure to instruct thereon.—State v. Francis, 659.

INSURANCE.

Hail insurance policies not contracts for direct payment of money,—see Attachment, 4.

Accident Insurance—Death—Written Notice—Insufficiency.

1. Under a provision in an accident insurance policy requiring immediate written notice, with full particulars of accidental death, to the insurer at its home office, it was incumbent upon the beneficiary, or someone acting in her behalf, within a reasonable time after the disappearance of the insured during a snowstorm while on a hunting trip in the mountains, to give some notice of the manner in which he met his death, she being convinced of his death a few days after the accident, although the remains were not found until some three years thereafter, and notice given seven months after knowledge thereof was insufficient.—Tuttle v. Pacific Mut. Life Ins. Co., 121.

Same—Written Notice to Home Office—Oral Notice to Agent Insufficient.

2. The requirement of immediate written notice to the home office of the insurer, of the accidental death of insured, held not to have been met by notice to the local agent of defendant during the course

Expert Testimony—Proper Instruction.

10. Refusal of defendants' requested instruction that expert testimony based on hypothetical questions is entitled to importance only when fairly given by one properly accredited by his experience and study, *etc.*, *held* improper.—Schumacher v. Murray Hospital, 447.

Cross-examination—Instruction to Disregard Testimony—Proper Refusal, When.

11. Where a party on cross-examination elicits statements in a colloquy with the witness upon a matter not touched upon in his direct examination, he is in no position to complain of the trial court's refusal to instruct the jury to disregard it.—Schumacher v. Murray Hospital, 447.

Reduction in Number Commendable.

12. Where defendant, in an action on implied contracts for legal services, offered three instructions of similar import covering three causes of action in which he had interposed the defense of an express contract, the court's modification of one so as to make it apply to all three causes of action and then refusing the other two, *held* proper, reduction of the number of instructions in a simple case being commendable.—Baldwin v. Silver, 495.

Attorney and Client—Fees—Proper Refusal of Instruction on Conversion.

13. Refusal of an instruction offered by defendant on the subject of conversion in connection with his counterclaims in an action to recover for legal services, where conversion was not charged directly in either of them, the court, treating the counterclaims as seeking to recover for moneys had and received, having fully advised the jury as to defendant's rights in the premises, was not error.—Baldwin v. Silver, 495.

Weight of Uncorroborated Testimony—Proper Refusal of Instruction.

14. Refusal of an instruction to the effect that the uncorroborated testimony of a witness is insufficient in law to prove a fact was proper, under section 7861, Revised Codes.—Williams v. Thomas, 576.

Homicide—Insanity—Burden of Proof.

15. In a prosecution for murder, an instruction that, the commission of the homicide being proved, the burden rested upon defendant to offer evidence in support of his defense, the burden, however, being no greater than to introduce evidence sufficient to raise a reasonable doubt as to his guilt, was proper.—State v. Colbert, 584.

Same—Defense—Insanity—Proper Instruction.

16. An instruction that if the jury believed beyond a reasonable doubt that defendant committed the crime as charged, knowing it was wrong and mentally capable of choosing either to do or not to do the act and of governing his conduct in accordance with his choice, they should find him guilty, though believing he was not entirely and perfectly sane, properly stated the law.—State v. Colbert, 584.

Same—Instructions to be Considered as a Whole.

17. The charge to the jury must be considered as a whole, and if a particular instruction is correct in point of law and applicable to the evidence, it is not erroneous because it does not refer to instructions on other branches of the case with which it is consistent.—State v. Colbert, 584.

Same—Insanity—Separate Instruction—When Refusal not Reversible Error.

18. Where, from the charge as a whole, the jury must have understood that after defendant had introduced evidence tending to show

that he was insane when he committed the homicide for which he was on trial the burden then shifted to the state to establish his sanity, failure to give a separate instruction to that effect was not reversible error.—State v. Colbert, 584.

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19. An instruction on "preponderance of the evidence" has no place in a criminal trial, the defendant being required to do no more in the way of evidence in his behalf than introduce sufficient to raise a reasonable doubt of his guilt.—State v. Francis, 659.

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20. An instruction offered by defendant on the law of circumstantial evidence to the effect that if there was any single fact proved to the satisfaction of the jury inconsistent with his guilt, acquittal should follow, was correctly refused, since the jury must draw its conclusion from the circumstances relied upon for conviction as a whole, and if then they are inconsistent with any rational hypothesis other than his guilt, a verdict of guilty may follow.—State v. Francis, 659.

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23. Defendant, not having offered an instruction as to the purpose for which certain testimony had been received, must be presumed to have been satisfied that none was necessary, and was therefore in no position to complain of failure to instruct thereon.—State v. Francis, 659.

INSURANCE.

Hail insurance policies not contracts for direct payment of money,—see Attachment, 4.

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1. Under a provision in an accident insurance policy requiring immediate written notice, with full particulars of accidental death, to the insurer at its home office, it was incumbent upon the beneficiary, or someone acting in her behalf, within a reasonable time after the disappearance of the insured during a snowstorm while on a hunting trip in the mountains, to give some notice of the manner in which he met his death, she being convinced of his death a few days after the accident, although the remains were not found until some three years thereafter, and notice given seven months after knowledge thereof was insufficient.—Tuttle v. Pacific Mut. Life Ins. Co., 121.

Same—Written Notice to Home Office—Oral Notice to Agent Insufficient.

2. The requirement of immediate written notice to the home office of the insurer, of the accidental death of insured, held not to have been met by notice to the local agent of defendant during the course

of an informal conversation.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Waiver.

3. Where an insurance policy contains a provision against waiver by an agent of the insurer, it is both notice to and agreement by the policy-holder that no agent has authority to waive any of its conditions.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Waiver—What Does not Constitute.

4. Letters in which insurer, among other things, denied liability on the ground that the requirement as to notice had not been met and in which it was expressly stated that nothing therein was to be construed as a waiver, *held* incapable of construction as a waiver.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Waiver—Unreasonable Provision.

5. *Quaere*: Is a provision in an insurance policy that no waiver shall be valid unless in writing from the home office and signed by its president or vice-president, and the secretary or assistant secretary, a reasonable one?—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Manner of Death—Burden of Proof.

6. In an action to recover on a policy under which the liability of the insurer is specifically limited to insurance against death by accident resulting from bodily injuries and caused solely by external, violent and accidental means, independent of all other causes, within ninety days after the injury, the plaintiff has the burden of proving not only that death ensued, but also that it was caused as provided in the policy and occurred within the time limited after the injury.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—"Accidental" Death—Definition.

7. Where, in the act which precedes an injury resulting in death, something unforeseen or unusual occurs which produces the injury, the injury is accidental within the meaning of an accident policy; death resulting from voluntary physical exertion, from intentional acts of the insured, from disease, or from the vicissitudes of climate or atmosphere not falling within the definition.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Accidental Death of Insured—Evidence—Insufficiency.

8. Evidence that insured who, while on a hunting trip, left camp in a snowstorm and perished, his remains being found about three years thereafter, two miles from camp, at a place where he could not have fallen to his death, his rifle not being near the body and a pistol being in his pocket, *held* to have been insufficient to show that death resulted from external, violent and accidental means within the meaning of an accident insurance policy, there being no presumption that he met death by such means.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Life Insurance—Time Essence of Contract—Forfeiture.

9. Time is of the essence of all insurance contracts, and failure to pay the premium when due, or of any installment thereof, works a forfeiture, unless by a course of dealing with the insured the insurer has evinced an intention to waive strict compliance.—*Nelson v. Mutual Life Ins. Co.*, 153.

Same—Forfeiture—Waiver—Burden of Proof.

10. Where plaintiff in an action on a life insurance pleaded reinstatement after forfeiture resultant from nonpayment of an installment of the premium, asserting that the insurer waived the provision of the contract which required the insured to furnish a cer-

Finding Unsupported by Evidence—Reversal.

3. A judgment based upon a finding of the district court, in an action on an insurance policy tried by it without a jury, unsupported by evidence, will be reversed.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Must be Rendered in Open Court.

4. The rendition of a judgment is a judicial act which, to be valid, must be done in open court.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Rendition of Judgment—What Constitutes—Signature by Judge not Necessary.

5. Under section 6800, Revised Codes, the ministerial act of the clerk of the district court of recording a general verdict constitutes the rendition of judgment, the drawing of a formal judgment and signing thereof by the judge not being essential to its validity.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Same—Special Verdicts—Special Findings.

6. Where, in an action at law the court directs the jury to return a special verdict or special findings, it is its duty to render the proper judgment in open court, the announcement of its decision and the entry of it in the minutes constituting the rendition of the judgment.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Equity Cases—What Constitutes Judgment.

7. In equity cases, if the decision of the court is general or the findings are not accompanied by conclusions of law embodying specific directions as to the adjustment of the rights of the parties, the clerk cannot enter judgment until its terms have been finally fixed by the court, after which its entry, in conformity with such directions, constitutes the judgment of the court, though not signed by the judge. *McIntyre v. Northern Pacific Ry. Co.*, 256.

Signing of Judgment in District Other Than That in Which Trial Had—Effect.

8. Since, under the rules above, the drawing of a formal judgment in an action to recover damages for death caused by negligence in which the trial judge directed a verdict for defendants, and signing thereof by the judge, were not essential to the validity of the judgment after entry by the clerk, the fact that he did sign it at chambers in his own district, whereas the action was brought and the trial had in another district, did not render the judgment void.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Contempt—Judgment—Insufficiency.

9. *Held*, on *certiorari*, that an order adjudging an attorney guilty of a direct contempt in that he had been insulting and impudent in his remarks to the court; that, though admonished a number of times not to repeat a question to a witness, he nevertheless repeated it each time; that while the court was undertaking to make remarks, it was interrupted by contemnor; and that his manner throughout the trial had been such as to bring the court in contempt and interfere with the proper administration of justice, was insufficient to meet the requirements of section 7311, Revised Codes, which provides that the court shall set out the facts—not conclusions—which occurred, from which, on review, it may be determined whether the court had jurisdiction to subject the contemnor to the payment of a fine or commit him to jail.—*State ex rel. Rankin v. District Court*, 276.

Default Judgment—What Does not Constitute.

10. Where, after issues were joined in a divorce proceeding, the plaintiff failed to appear at the time set for trial, her counsel, however, being present and participating in it, an order directing that her default be entered amounted to no more than a declaration that she had failed to be personally present, and did not constitute a "default" within the meaning of section 6719, necessitating a motion to set it aside, and, such a motion having been made, an order denying it could not adversely affect any substantial right of plaintiff and therefore was not an appealable error.—*Sell v. Sell*, 329.

Same—Power of Clerk to Enter.

10a. *Held*, that under section 6719, Revised Codes, the power of the clerk of the district court to enter a default in any case is restricted to those in which no appearance, either general or special, has been made.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Setting Aside Default—When Proper.

11. *Held*, that where the clerk of the district court entered defendants' default, although within the time for making appearance they had filed a motion requiring plaintiff's attorney to show his authority for appearing, which motion had not been called to the court's attention for determination, an order granting the motion to set aside the default was proper.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Entry by Clerk—When Unauthorized.

12. Upon lodgment of the findings of fact and conclusions of law of the trial judge in a foreclosure suit with the clerk of the district court, the extent of the latter's duty was to file them, and therefore his subsequent act in formulating a judgment and entering it at the request of counsel for the plaintiff was unauthorized and void.—*Security Trust & Savings Bank v. Reser*, 501.

What Constitutes Judgment.

13. The announcement of the ultimate conclusion of the court upon the issues submitted and a direction to the clerk to enter it constitute its judgment; until these things are done, the clerk has no right to enter judgment.—*Security Trust & Savings Bank v. Reser*, 501.

Unauthorized Entry—Dismissal for Failure to Enter.

14. Where the clerk of the district court entered a final decree in a foreclosure suit, though the court had done no more than transmitted to him its findings of fact and conclusions of law, there was no rendition of judgment, entry of which the successful party could demand, and hence his failure to demand it within six months after the clerk's unauthorized entry thereof did not constitute that neglect which warrants dismissal of the action under section 6714, Revised Codes.—*Security Trust & Savings Bank v. Reser*, 501.

Default Judgment—Setting Aside—Discretion.

15. A stronger showing of abuse of discretion should be made to warrant a reversal where the trial court has opened a default than where it has refused to do so, the courts favoring a trial on the merits.—*Beadle v. Harrison*, 606.

Same—When Order Proper.

16. Where there has been a reasonable excuse for a default offered with reasonable diligence, the motion to vacate it should be granted and trial on the merits had.—*Beadle v. Harrison*, 606.

Finding Unsupported by Evidence—Reversal.

3. A judgment based upon a finding of the district court, in an action on an insurance policy tried by it without a jury, unsupported by evidence, will be reversed.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

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Same—Power of Clerk to Enter.

10a. *Held*, that under section 6719, Revised Codes, the power of the clerk of the district court to enter a default in any case is restricted to those in which no appearance, either general or special, has been made.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Setting Aside Default—When Proper.

11. *Held*, that where the clerk of the district court entered defendants' default, although within the time for making appearance they had filed a motion requiring plaintiff's attorney to show his authority for appearing, which motion had not been called to the court's attention for determination, an order granting the motion to set aside the default was proper.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

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Unauthorized Entry—Dismissal for Failure to Enter.

14. Where the clerk of the district court entered a final decree in a foreclosure suit, though the court had done no more than transmitted to him its findings of fact and conclusions of law, there was no rendition of judgment, entry of which the successful party could demand, and hence his failure to demand it within six months after the clerk's unauthorized entry thereof did not constitute that neglect which warrants dismissal of the action under section 6714, Revised Codes.—*Security Trust & Savings Bank v. Reser*, 501.

Default Judgment—Setting Aside—Discretion.

15. A stronger showing of abuse of discretion should be made to warrant a reversal where the trial court has opened a default than where it has refused to do so, the courts favoring a trial on the merits.—*Beadle v. Harrison*, 606.

Same—When Order Proper.

16. Where there has been a reasonable excuse for a default offered with reasonable diligence, the motion to vacate it should be granted and trial on the merits had.—*Beadle v. Harrison*, 606.

JURISDICTION.

Of district courts,—see District Courts; Estates of Deceased Persons.

Appearance—Motion Challenging Jurisdiction—Effect.

1. Under section 6719, Revised Codes, the filing by defendant of a motion challenging the jurisdiction of the court before he interposes his answer or demurrer extends the time for making appearance on the merits until the motion is determined.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Challenging Attorney's Authority.

2. Since the word "jurisdiction" as used in section 6719 above means the power of the district court to hear and determine a cause, which power ceases when it is shown that the action was brought without authority, a motion of defendant challenging the right of the attorney for plaintiff to appear is, in effect, one advising the court that it has not properly acquired the power to hear and determine, and therefore one challenging jurisdiction.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Justices of the Peace—Appeal.

3. The right of appeal from a justice court presupposes jurisdiction in it to enter the judgment or order from which an appeal may be taken; hence where such court was without jurisdiction, none was acquired by the appellate court on an attempted appeal.—*State ex rel. Chicago etc. Ry. Co. v. Gibb*, 518.

Same—Appeal—Jurisdiction of Appellate Court.

4. On appeal from a justice court to the district court the cause is tried anew, the district court sitting as a justice of peace, with no greater jurisdiction than the latter court had.—*State ex rel. Chicago etc. Ry. Co. v. Gibb*, 518.

Probate Courts—Jurisdiction of Foreign Court.

5. A decree made by a court of another state in a probate proceeding will be presumed to have been made within jurisdiction.—*In re Estate of Bruhns*, 526.

Supreme Court—Workmen's Compensation—Original Jurisdiction—Constitution.

6. Section 22 (d) of the Workmen's Compensation Act so far as it confers jurisdiction upon the supreme court to try *de novo* a case appealed to it from the district court, *held* unconstitutional.—*Willis v. Pilot Butte Min. Co.*, 26.

JURY.

See, also, Instructions; Verdicts.

Criminal law—Selection—Challenge by trial judge—Right of defendant,—see Criminal Law, 1-3.

Personal Injuries—Submission of Case to Jury—Scintilla of Evidence Insufficient.

1. To justify the submission of a personal injury case to the judgment of a jury, something more than a mere scintilla of evidence to sustain plaintiff's claim is required.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

JUSTICES OF THE PEACE.

Appeal—Jurisdiction.

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Default Judgment—Lack of Jurisdiction—*Certiorari*.

3. A justice of the peace on April 5, the day set for trial of a civil action, continued the cause "for the present"; he later fixed the day for hearing the case for June 2, and, being out of the city on that day, continued it to June 16, when, defendant not appearing within one hour, he entered judgment by default. *Held*, that by failing to comply with the provisions of sections 7033–7037, Revised Codes, relating to time of trial and postponements in justices' courts, he was without jurisdiction to enter judgment, and that the district court on *certiorari* properly annulled it.—*State ex rel. Chicago etc. Ry. Co. v. Gibb*, 518.

LANDLORD AND TENANT.

See Contracts, 21–23.

LAW OF CASE.

See Appeal and Error, 23.

LEASES.

See Contracts, 21–23.

LEGISLATURE.

See, also, Statutes and Statutory Construction.

Funding Bonds—Power of Legislature.

1. The legislature has power to grant cities and towns authority to fund their floating indebtedness.—*Parker v. City of Butte*, 531.

LIBEL AND SLANDER.

Complaint—Contents, if Language not Slanderous *Per Se*.

1. If alleged slanderous language is not slanderous *per se*, special damages must be pleaded, else the complaint does not state a cause of action.—*Daniel v. Moncure*, 193.

Same.

2. Where language charged to have been slanderous, in and of itself is not defamatory, but becomes so only in the light of the circumstances surrounding the utterance, the extrinsic facts disclosing its slanderous character must be pleaded.—*Daniel v. Moncure*, 193.

Construction of Language.

3. Alleged defamatory matter must be construed as an entirety and with reference to the remaining portion of the conversation giving rise to an action for slander.—*Daniel v. Moncure*, 193.

Same.

4. Alleged slanderous words are to be construed according to their usual, popular and natural meaning and common acceptance; that is, in the sense in which persons out of court and of ordinary intel-

MOOT QUESTIONS.

Dismissal of appeal,—see Appeal and Error, 5, 31.

MORTGAGES.

Cancellation,—see Contracts, 29-33; see, also, Fraud.

Forged acknowledgment—Liability of sureties,—see Notaries Public, 1-3.

Chattel—Filing—Notice to Subsequent Mortgagees.

1. Where a chattel mortgage was a valid and subsisting lien and filed in the county where the mortgagor resided, as required by the statute in force at the time, it imparted notice to a subsequent mortgagee (a bank), which acquired its right subject to the superior right of the prior mortgagee, the rights of the parties being fixed as of the date of the second mortgage, unaffected by the failure of the first mortgagee to file an extension affidavit.—*Chester State Bank v. Minneapolis T. M. Co.*, 44.

Same—Valid Between Parties Until Paid.

2. A chattel mortgage is valid until the debt is paid, not only between the parties to it, but also as against others except creditors of the mortgagor and subsequent purchasers and encumbrancers in good faith.—*Chester State Bank v. Minneapolis T. M. Co.*, 44.

Same—Subsequent Encumbrancer in Good Faith—Definition.

3. To constitute one a subsequent encumbrancer in good faith, he must have taken his mortgage without knowledge, actual or constructive, of the existence of a prior one.—*Chester State Bank v. Minneapolis T. M. Co.*, 44.

Same—Filing—Change in Statute—Effect.

4. Where the statute in force at the time a chattel mortgage was executed required that it be filed in the county where the mortgagor resided, a subsequent change in the law requiring its filing in the county where the property was situated could not affect the validity of the mortgage.—*Chester State Bank v. Minneapolis T. M. Co.*, 44.

Same—Recordation—Effect of Change in County Boundaries.

5. The validity of the recordation of an instrument affecting title to real or personal property is not affected by subsequent changes in the boundaries of the recording district, whereby the property is made to fall within a different district.—*Chester State Bank v. Minneapolis T. M. Co.*, 44.

Same—Creation of New County—Renewal Filed in Old County—Effect on Rights of Mortgagee.

6. A chattel mortgage was filed by defendant in C. county, where the mortgagor resided and the property was situated, as required by section 5761, Revised Codes, before amendment, the mortgage being kept alive by renewal affidavits filed in that county. A second mortgage was taken on the same property by a bank about a year thereafter. Subsequently H. county was created, including among others, the portion of C. county, where the mortgagor resided. The bank, after the creation of the new county, filed its renewal affidavits in that county. Upon default in payment of the first mortgage, defendant bought it in on judicial sale. *Held*, under the rule above (paragraph 5), in an action in claim and delivery by the bank, that the priority of the first mortgage was not affected by the change in county boundaries by which the place of residence became part of the new county, or the failure of defendant to file its renewal affidavits in that county.—*Chester State Bank v. Minneapolis T. M. Co.*, 44.

Foreclosure—Right of Divorced Wife to Redeem.

7. *Held*, that a divorced woman has no right to redeem lands which belonged to her former husband and which were sold under mortgage foreclosure, though at the time the mortgage was executed she was the wife of the mortgagor, joined in its execution as well as that of the note secured by it, and was a party defendant in the foreclosure suit.—*State ex rel. Harnden v. Crawford*, 72.

Chattel—Impairment of Security—Evidence Inadmissible as Speculative.

8. In an action by the mortgagee of a timber flume to recover damages for its destruction and consequent impairment of his security, testimony offered by him that there was merchantable timber on government land near the flume to cut which he might have secured a contract and thus used the flume and realized a profit, held properly excluded as speculative.—*Robison v. Dover Lumber Co.*, 231.

Same—What not Defense—Estoppel.

9. Where mortgaged property is injured or its value lessened, the wrongdoer is liable to the mortgagee and may not be heard to justify his wrongful act by invoking the provisions of a contract under which the property would have become the property of another in the event of a certain contingency.—*Robison v. Dover Lumber Co.*, 231.

Same—Measure of Damages.

10. The measure of damages in an action for the destruction of mortgaged property and impairment of the mortgagee's security is the amount remaining due upon the debt secured by the mortgage, not to exceed the value of the property claimed to have been damaged.—*Robison v. Dover Lumber Co.*, 231.

Same—Value—Admissions—Instructions.

11. The complaint having alleged that the value of the flume was totally destroyed, and the answer having admitted that it was of no value, there was no issue on the question of value and an instruction thereon was unnecessary and misleading.—*Robison v. Dover Lumber Co.*, 231.

Same—Attaching Creditors—Deposit—Wrongful Satisfaction of Mortgage.

12. Evidence in an action by an attaching creditor to recover the amount of the deposit made by him at the time he attached mortgaged chattels, on the alleged ground that his right of recoupment against the attached property had been destroyed by the wrongful act of the mortgagee, after payment of the deposit to him, in certifying of record that the mortgage had been fully satisfied and discharged, thus causing the property to be subsequently sold to an innocent purchaser, *held* to show that the purchaser was not an innocent one, that the loss sustained by plaintiff was due to his own relinquishment of his lien, and not to the wrongful act of defendant, and that the latter was therefore not liable.—*Degenhart v. Cartier*, 245.

Same—Effect of Deposit by Attaching Creditor—Subrogation.

13. By depositing the amount of a prior chattel mortgage, an attaching creditor is subrogated to the right of the mortgagee for the purpose of subjecting the property to the satisfaction of his claim.—*Degenhart v. Cartier*, 245.

Forbearance to Foreclose—Consideration.

14. Forbearance from foreclosing a mortgage executed by defendant's husband in his lifetime, *held* to have been a sufficient con-

sideration for the execution of an additional one on property owned by her.—*Emerson-Brantingham L. Co. v. Anderson*, 617.

Conversion—Action by Chattel Mortgagee—Complaint—Insufficiency.

15. *Held*, that the complaint in an action by a mortgagee to recover possession of chattels covered by mortgage was insufficient in the absence of an averment that plaintiff was the owner and holder of the notes secured by the mortgage as the date of conversion.—*Perkins & Co. v. Duluth Brewing & Malting Co.*, 691.

MURDER.

See Criminal Law, 14, 15, 23–32.

NEGATIVE PREGNANT.

See Pleading and Practice, 34.

NEGLIGENCE.

See Personal Injuries; Physicians and Surgeons; Presumptions, 9, 10.

NEW TRIAL.

Order of Denial to be Sustained if Possible, When.

1. Where an order denying a motion for new trial is general in terms, it must be sustained, if it can be upon any legitimate ground. *Sell v. Sell*, 329.

Statutory Provisions to be Complied With.

2. A party moving for a new trial may, under section 6795, Revised Codes, in the same motion, present some of the causes designated in section 6794, and relied upon, by affidavit, others by bill of exception and still others upon the minutes of the court, but irrespective of the mode selected, the movant must pursue the statute in all substantial particulars.—*Sell v. Sell*, 329.

Failure to File Affidavits in Time—Proper Denial of Motion.

3. *Held*, that since the purpose sought to be subserved by Chapter 41, Laws of 1907, amending prior statutes relating to new trial proceedings, was to avoid delays, by providing the means for a hearing upon the motion immediately after notice of intention is given, the movant may not designate the minutes of the court and affidavits thereafter to be prepared as the moving papers, then secure an extension of time in which to prepare them, afterward abandon the affidavits by failing to prepare them within the time allowed, and then insist that the motion should be heard on the minutes of the court.—*Sell v. Sell*, 329.

When Proper.

4. Where, in the opinion of the trial court, the evidence preponderates against the finding of the jury, it should be set aside and a new trial granted.—*Johnson v. Northern Pacific Ry. Co.*, 411.

Evidence Preponderating Against Verdict—Discretion.

5. Where, in an action for false imprisonment and malicious prosecution, an order granting a new trial, general in terms, was justifiable on the theory that the evidence, conflicting in character, preponderated against the finding of the jury in favor of plaintiff, the supreme court will not say on appeal that the trial court abused its discretion in granting the motion.—*Johnson v. Northern Pacific Ry. Co.*, 411.

Conflict in Evidence—Affirmance of Judgment.

6. An order denying a motion for new trial will not be reversed where the verdict of the jury and judgment of the court are based on substantially conflicting evidence.—*Zalac v. Barich*, 428.

Criminal Law—Motion for New Trial—*Nunc Pro Tunc* Order—Invalidity—Fugitive from Justice.

7. Where defendant, after being found guilty of crime, became a fugitive from justice, a *nunc pro tunc* order made on surrendering himself some sixteen months later, and long after the time for perfecting his motion for new trial had expired, extending the time for filing his bill of exceptions and affidavits, *held* of no effect and that the motion for new trial was properly denied.—*State v. Francis*, 659.

NONSUIT.

In action for divorce—When proper,—see Husband and Wife, 6.

Variance—Failure to Amend—Nonsuit Proper.

1. Where defendant failed to ask permission to amend his counterclaim though his attention had been called to a variance between his allegations, both by objection to the introduction of testimony in support of it and plaintiff's motion for nonsuit because of the variance, the order of the court granting the motion will not be disturbed on appeal.—*Wipf v. Kelleher*, 87.

When Denial Proper.

2. Motion for nonsuit was properly denied in a malpractice case where, though most of the testimony of plaintiff's experts was not direct as to defendants' negligence and want of care or skill, one expert categorically stated that the treatment given the patient showed lack of care.—*Schumacher v. Murray Hospital*, 447.

Rule.

3. A case should never be withdrawn from the jury, unless it appears as a matter of law that a recovery cannot be had upon any view of the facts which the evidence reasonably tends to establish; but, whenever there is no evidence in support of plaintiff's case, or the evidence is so unsubstantial that the court would feel compelled to set aside a verdict, if one should be rendered for plaintiff, a nonsuit should be granted.—*Loudon v. Scott*, 645.

NOTARIES PUBLIC.**Official Bonds—Sureties—When Liable.**

1. Under section 326, Revised Codes, the sureties on the official bond of a notary public are liable only for injury which results proximately from his official misconduct or neglect.—*Ellis v. Hale*, 181.

Same—False Acknowledgment to Real Estate Mortgage—Damages—Burden of Proof.

2. Official misconduct of a notary public in making a false acknowledgment to a real estate mortgage was not alone sufficient to render the sureties on his official bond liable for the damages flowing from the fraudulent act; to have this effect it was necessary for plaintiff to show that he parted with value in reliance upon the verity of the acknowledgment.—*Ellis v. Hale*, 181.

Same—Damages—Failure of Proof.

3. Plaintiff, a real estate and loan agent, had made a loan upon a mortgage in which a client was named as mortgagee, the acknowledgment to which instrument had been forged by a notary public who embezzled the amount of the note supposedly secured by it sent

to him to be paid over to the mortgagors. The mortgagee transferred the note and mortgage to another, to whom, upon discovery of the fraud, plaintiff of his own motion repaid the amount expended by him. *Held*, in an action against the sureties on the official bond of the notary, that, in the absence of evidence showing that he parted with his money, when he voluntarily repaid the transferee, in reliance upon the forged acknowledgment, he failed to make out his case, and that judgment in favor of defendants was proper.—*Ellis v. Hale*, 181.

NOTICE.

Of motion to set aside default judgment,—see Judgments, 1.
Under provisions of insurance policy,—see Insurance, 1-4.

NUNC PRO TUNC ORDERS.

See Pleading and Practice, 39.

OFFER OF PROOF.

Proper rejection,—see Evidence, 34.

OFFICERS.

Removal of county officers—Costs,—see County Officers, 1.

OFFICIAL BONDS.

Action against surety,—see Notaries Public, 1-3.
Wrongful attachment,—see Sheriffs.

ORDINANCES.

When irrevocable,—see Cities and Towns, 16.

PARTIES.

Defect—Objection—How taken—Waiver,—see Pleading and Practice, 6, 7.

PARTNERSHIP.

Evidence—Error—Curing Error.

1. Where in an action against alleged copartners, the answering defendant denied the partnership, error in admitting testimony of the reputation of the defendants as copartners on the statement of counsel for plaintiff that he would bring knowledge of the alleged reputation home to the answering defendant, which condition remained unfulfilled, was cured by striking the testimony from the record with an admonition to the jury not to consider it in arriving at their verdict.—*Sanborn Co. v. Powers*, 214.

Evidence—Sufficiency.

2. Evidence examined and *held* sufficient to establish a partnership within the meaning of sections 5466 and 5467, Revised Code.—*Sanborn Co. v. Powers*, 214.

PERSONAL INJURIES.

See, also, Workmen's Compensation.

Railroads—City Yards—Duty Owing to Trespassers.

1. To a trespasser using a railway company's city yards for the purpose of crossing the tracks at a place not customarily used by

those living in the vicinity or by the public as a crossing by acquiescence of the company, it owes no duty other than to avoid injury to him after his presence and peril have actually been discovered.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Submission of Case to Jury—Scintilla of Evidence Insufficient.

2. To justify the submission of a personal injury case to the judgment of a jury, something more than a mere scintilla of evidence to sustain plaintiff's claim is required.—*McIntyre v. Northern Pacific Ry. Co.*, 256.

Railroads—Personal Injuries—Master and Servant—Complaint—Absence of Essential Allegation—Insufficiency.

3. The complaint in an action for personal injuries against a railway company which did not allege that plaintiff was employed by the defendant at the time of the injury did not state a cause of action under the federal or state Employers' Liability Act, nor, if he was an employee or a passenger, under the federal Safety Appliance Act, nor upon the theory that the action was the ordinary one for damages for personal injuries resulting from negligence.—*Ecclesine v. Great Northern Ry. Co.*, 470.

Negligence—Complaint—Contents.

4. To state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, its breach, the resulting damages and that the breach of duty was a proximate cause of the injury.—*Ecclesine v. Great Northern Ry. Co.*, 470.

PERSONAL PROPERTY.

See, also, Contracts; Sales.

Taxation,—see Taxation, 7-12.

PHYSICIANS AND SURGEONS.

Malpractice—Evidence—Direct Examination—Extracts from Medical Text-books Inadmissible.

1. In an action against a hospital and attending physicians for malpractice it is error to permit counsel for plaintiff to incorporate in his questions to physicians in his case in chief statements from text-books on medical subjects.—*Schumacher v. Murray Hospital*, 447.

Same—Extent of Care of Patient Required.

2. A patient who places himself in the care of a physician for a fractured hip-joint is entitled to an ordinarily careful and thorough examination, such as the circumstances, his condition and the physician's opportunities for examination permit and demand.—*Schumacher v. Murray Hospital*, 447.

Same—Failure to Take X-ray Photograph—Negligence—Jury Question.

3. The question whether the conditions surrounding decedent at the time he was taken to the hospital and during the time he remained there for treatment for an impacted fracture of the hip-joint demanded the use of the X-ray was one for the jury's determination.—*Schumacher v. Murray Hospital*, 447.

Same—X-ray Photograph—Instruction—Improper Refusal.

4. *Held*, in view of the testimony of plaintiff's expert witnesses as to the circumstances under which they would use the X-ray, that the court erred in refusing defendants' offered instruction to the effect that the jury could not consider any reference to their failure to take an X-ray picture of decedent's hip unless plaintiff had proved

that it was usual and customary under the circumstances for ordinarily skillful and careful physicians to take one, and that proof of such failure was not by itself evidence of negligence.—*Schumacher v. Murray Hospital*, 447.

Same—Failure of Patient to Obey Directions—Inapplicable Instruction.

5. Defendants' requested instruction that, if deceased had refused to adopt the remedies prescribed by or comply with the physicians' directions, and such refusal proximately contributed to his death, there could be no recovery, *held* properly refused in the absence of a plea of contributory negligence or substantial evidence showing such condition.—*Schumacher v. Murray Hospital*, 447.

Same—Force of Expert Medical Testimony—Improper Instruction.

6. Defendants' requested instruction that the question whether or not they exercised reasonable and ordinary care and skill in the treatment of decedent was to be determined from the expert testimony of physicians and surgeons alone, *held* properly refused as taking from the jury consideration of the evidence of lay witnesses concerning conditions upon which their testimony was relevant and material. *Schumacher v. Murray Hospital*, 447.

Same—Expert Testimony—Proper Instruction.

7. Refusal of defendants' requested instruction that expert testimony based on hypothetical questions is entitled to importance only when fairly given by one properly accredited by his experience and study, *etc.*, *held* improper.—*Schumacher v. Murray Hospital*, 447.

Same—Methods of Treatment—Negligence.

8. *Held*, that it was error to refuse defendants' offered instruction that a physician or surgeon is not bound to use any particular method of treatment, and that if among practitioners of ordinary skill and learning more than one method of treatment is recognized as proper, it was not negligence for defendants to adopt either of such methods.—*Schumacher v. Murray Hospital*, 447.

Same—Diagnosis of Injury—Error of Judgment not Negligence.

9. Error of judgment on the part of a physician or surgeon resulting in an incorrect diagnosis of a disease or injury does not alone render him liable in damages; nor does the fact that others might have adopted a different method of treatment convict him of negligence or want of skill or care; but if the method adopted has substantial medical support, it is sufficient.—*Schumacher v. Murray Hospital*, 447.

Same—Nonsuit—When Denial Proper.

10. Motion for nonsuit was properly denied in a malpractice case where, though most of the testimony of plaintiff's experts was not direct as to defendants' negligence and want of care or skill, one expert categorically stated that the treatment given the patient showed lack of care.—*Schumacher v. Murray Hospital*, 447.

Same—Gist of Action.

11. A physician is not an insurer, and a malpractice case does not differ in its essential ingredients from any other action for damages arising from negligence; the gist of the action being negligence, and actionable negligence arises only from a breach of legal duty.—*London v. Scott*, 645.

Same—Extent of Duty Toward Patient.

12. A physician assumes toward his patient the obligation to exercise such reasonable care and skill as is usually exercised by physicians or surgeons of good standing of the same system or school of practice in the community in which he resides, having due regard

to the condition of medical or surgical science at that time.—*Loudon v. Scott*, 645.

Same—When Expert Testimony Necessary.

13. *Held*, that expert medical testimony was necessary to determine the question whether a physician, in administering an anesthetic to his patient at a time when the latter showed the effects of drinking intoxicating liquors, was wanting in the exercise of ordinary care and skill which the law requires.—*Loudon v. Scott*, 645.

Same—Negligence—Evidence—Admission.

14. The statement of a physician that he knew it was dangerous to administer an anesthetic to an intoxicated patient, but because of his knowledge of patient's physical condition he felt justified in proceeding, was not an admission that the treatment did not conform to requirements of good surgery, not indicate want of care, skill, ability or diligence.—*Loudon v. Scott*, 645.

Same—Negligence in Administering Anesthetic—Presumptions.

15. Since the evidence disclosed that the element of danger is present in every instance where a patient is anesthetized, negligence could not be presumed from the fact that it was dangerous to administer the anesthetic before he had entirely recovered from over-indulgence in strong drink or from the fact that he died shortly thereafter.—*Loudon v. Scott*, 645.

Same—*Res Ipsa Loquitur*—Inapplicability of Doctrine.

16. The doctrine of *res ipsa loquitur* has no application to a malpractice case.—*Loudon v. Scott*, 645.

Same—Burden of Proof.

17. In an action for damages against a physician for negligently causing the death of a patient, plaintiff had the burden of proving negligence in the particular charged and that death resulted proximately from such negligence.—*Loudon v. Scott*, 645.

Same—Error of Judgment—Damages—Nonliability.

18. For an error of judgment by a physician of requisite learning, skill and ability, in the treatment of a patient, he cannot be held responsible in damages.—*Loudon v. Scott*, 645.

Same—Presumptions.

19. There is no presumption that a physician has authority to detain a patient in a hospital a sufficient length of time to enable him to recover from the effects of intoxication before undergoing an operation, any more than that he may operate upon him without his consent.—*Loudon v. Scott*, 645.

PLEADING AND PRACTICE.

Reply—When Unnecessary.

1. Where the averments of the answer do not amount to an admission of the allegations of the complaint, but tend to establish some circumstance or fact not inconsistent with them, deny all of such allegations and plead facts inconsistent with plaintiff's cause of action, a reply is not necessary.—*Wilcox v. Newman*, 54.

Complaint—Anticipating Defense—Admissions—Refusal to Strike—Harmless Error.

2. If error was committed in refusing to strike a paragraph from plaintiff's complaint in an action for work and labor performed and goods furnished, which anticipated defendant's defense by alleging that the latter had an offset or counterclaim in a stated amount, it was rendered harmless by permission to defendant to plead a counter-

claim for the same amount for which he received credit, plaintiff's allegation amounting to no more than an admission that the amount stated was due defendant.—*Smith v. Sullivan*, 77.

Counterclaim—Variance—Failure to Amend—Nonsuit.

3. Where defendant failed to ask permission to amend his counterclaim though his attention had been called to a variance between his allegations, both by objection to the introduction of testimony in support of it and plaintiff's motion for nonsuit because of the variance, the order of the court granting the motion will not be disturbed on appeal.—*Wipf v. Kelleher*, 87.

***Certiorari*—Insufficiency of Petition—Conclusions.**

4. Where the application of a discharged police officer for writ of *certiorari* running to the examining and trial board contained neither a copy of the complaint in support of his assertion that it was insufficient nor a *résumé* of the testimony to show failure of proof, and his affidavit stated only legal conclusions, the court was without jurisdiction to issue the writ.—*State ex rel. Examining and Trial Board v. Jackson*, 90.

Same—Insufficiency of Affidavit—Motion to Quash Proper.

5. Though the Codes make no provision for a motion to quash a writ of *certiorari* for insufficiency of the affidavit filed in support of the application, the motion to quash is a proper method for testing the sufficiency of the pleading.—*State ex rel. Examining and Trial Board v. Jackson*, 90.

Defect of Parties—Objection—How Taken—Waiver.

6. Under Revised Codes, section 6534, if a defect of parties appears on the face of the complaint, it must be taken advantage of by demurrer, which, under section 6535, must point out specifically the defect relied on; where it does not so appear, objection may be taken by answer (section 6538); if not so taken, the defect is deemed waived in either case.—*Church v. Zywert*, 102.

Same—Waiver.

7. *Held*, that defendant, who at the time he filed his answer was cognizant of facts constituting an alleged partnership between plaintiff and another in the transaction at issue, failed to raise the question of defect of parties by his pleading, waived the objection.—*Church v. Zywert*, 102.

Appeal and Error—Complaint—When Deemed Amended to Conform to Proof.

8. Where evidence is admitted without objection on a theory not warranted by the complaint, the pleading will on appeal be deemed amended to conform to the proof.—*State ex rel. Dansie v. Nolan*, 167.

Pleading—Inconsistent Defenses.

9. In a civil action, defendant may interpose as many defenses as he may have, even if they are inconsistent, provided they are not so far inconsistent that, if one be true, the other must necessarily be false.—*Daniel v. Moncure*, 193.

Slander—Pleading—Inconsistent Defenses—Admissions.

10. *Held*, under the above rule (par. 8), that where defendant, after denying generally the allegations of the complaint in an action for slander, pleaded as a justification that the supposed defamatory language was true, did not amount to a confession of the charge in the complaint or supply allegations in the complaint necessary to make the language slanderous *per se*.—*Daniel v. Moncure*, 193.

Slander—Complaint—Contents, if Language not Slanderous *Per Se*.

11. If alleged slanderous language is not slanderous *per se*, special damages must be pleaded, else the complaint does not state a cause of action.—Daniel v. Moncure, 193.

Same—Complaint.

12. Where language charged to have been slanderous, in and of itself is not defamatory, but becomes so only in the light of the circumstances surrounding the utterance, the extrinsic facts disclosing its slanderous character must be pleaded.—Daniel v. Moncure, 193.

Splitting Causes of Action—Remedy.

13. Where plaintiff in her complaint had in one cause of action joined a claim for damages for injury to and conversion of personal property, for alleged slanderous statements concerning her and her business, and for injury to her person by reason of an invasion of the premises occupied by her as tenant, a motion that she be required to separately state and number her causes of action was a proper method of attacking the complaint.—McLean v. Dickson, 203.

Causes of Action—Motion to Separately State and Number—When Proper.

14. *Held*, that since the complaint above referred to alleged the invasion of more than one primary right and plaintiff could, under proper pleadings have maintained a separate and independent suit upon any one of them without subjecting herself to the charge that she had split her cause of action, the contention that because all of the acts complained of were done in pursuance of a conspiracy and that therefore but one wrong was committed entitling her to set forth all her allegations in one cause of action, was without merit.—McLean v. Dickson, 203.

Pleading—Value—Admissions.

15. The complaint having alleged that the value of certain personal property was totally destroyed, and the answer having admitted that it was of no value, there was no issue on the question of value and an instruction thereon was unnecessary and misleading.—Robison v. Dover Lumber Co., 231.

Answer—New Matter.

16. If the facts stated in the answer can be proved under a denial of the allegations of the complaint, they do not constitute new matter.—Sell v. Sell, 329.

General Denial—Evidence Admissible.

17. Under a general denial of the allegations of the complaint, the defendant may introduce any evidence which goes to controvert the facts, establishment of which is indispensable to his cause of action. Sell v. Sell, 329.

Divorce—Complaint—Necessary Allegation.

18. An allegation in plaintiff's complaint in an action for divorce that at the time of its commencement the parties were husband and wife was indispensable to a statement of a cause of action.—Sell v. Sell, 329.

Conversion—Possession of Property—Complaint—Sufficiency—Inferences.

19. In an action for damages in conversion, where plaintiff alleged ownership of the property at the time of the conversion, and further, that he was lawfully possessed of the same, it was properly to be inferred that he was then entitled to possession.—Didriksen v. Broadview Hardware Co., 421.

Amendment of Pleadings to Conform to Proof—Discretion.

35. Permission to a party to amend his pleading to conform to the facts proven is a matter within the discretion of the trial court.—*Williams v. Thomas*, 576.

Liberal Construction—Inferences.

36. It is the policy of the Practice Act that the most liberal rules of construction shall be applied to pleadings in civil actions; hence whatever is necessarily implied in, or reasonably to be inferred from, an allegation, is to be taken as directly averred.—*Woodward v. Melton*, 594.

Complaint—Sufficiency—Inferences.

37. *Held*, that the complaint alleging that plaintiffs were engaged in business in M. county, breeding, raising, *etc.*, sheep, "and for that purpose and to that end" had leased certain lands, describing them by government subdivisions, all in a certain township and range, and that defendants wrongfully grazed their sheep affected with contagious and infectious disease, on and over "the said lands of plaintiffs," *etc.*, was sufficient to show that the lands were in M. county and that the wrong was committed therein.—*Woodward v. Melton*, 594.

Malicious Prosecution—Complaint—Sufficiency—What Matter of Defense.

38. A complaint for malicious prosecution, alleging the commencement of the criminal prosecution against the plaintiff at the instigation of the defendant, want of probable cause, malice, favorable termination, and the amount of damages, states a cause of action, it not being incumbent upon plaintiff to negative consultation with counsel and a full disclosure of the facts, this being a matter of defense.—*Beadle v. Harrison*, 606.

***Nunc pro tunc* Order—Definition.**

39. A valid *nunc pro tunc* order is one which should have been made at an earlier date and which, therefore, courts may cause to take effect as of the date when it should have been made.—*State v. Francis*, 659.

Conversion—Action by Chattel Mortgagee—Allegation of Ownership—Complaint—Insufficiency.

40. *Held*, that the complaint in an action to recover possession of chattels, covered by mortgage, alleged to have been unlawfully seized and wrongfully detained by defendants, was insufficient in the absence of an averment that plaintiff mortgagee was the owner and holder of the notes secured by the mortgage at the date of conversion.—*Perkins & Co. v. Duluth Brewing & Malting Co.*, 691.

POLICE OFFICERS.

Removal,—see *Cities and Towns*, 1-10.

PREFERENCES.

See *Bankruptcy*.

PRESUMPTIONS.**Slander—Construction of Language.**

1. Alleged slanderous words are to be construed according to their usual, popular and natural meaning and common acceptance; that is, in the sense in which persons out of court and of ordinary intelligence would understand them, the presumption being that third parties present so understood them.—*Daniel v. Moncure*, 192.

Same—Negligence—Complaint—Contents.

27. To state a cause of action for damages resulting from negligence, it is necessary that the complaint disclose the duty, its breach, the resulting damages and that the breach of duty was a proximate cause of the injury.—*Ecclesine v. Great Northern Ry. Co.*, 470.

Complaint—Deemed Amended to Admit Proof—When Rule not Applicable.

28. The rule that where evidence was introduced at the trial of a cause without objection the complaint will, on appeal, be deemed amended to admit the evidence if necessary to sustain the judgment, applies only to a case in which the objection to the sufficiency of the complaint is raised for the first time in the supreme court, and not to one where the complaint had been attacked by general demurrer and an exception saved to an adverse ruling.—*Ecclesine v. Great Northern Ry. Co.*, 470.

Complaint—Challenging Sufficiency—Effect of Exception.

29. Where defendant challenges the sufficiency of the complaint by demurrer, or by objection to the introduction of evidence, his exception once saved to an adverse ruling is saved for all purposes during the proceedings in the case, and failure to repeat the objection thereafter when the same question is raised does not constitute a waiver. *Ecclesine v. Great Northern Ry. Co.*, 470.

Demurrer—Argument not Necessary, When.

30. In the absence of a request by the court therefor, counsel is not required to support with argument his objection to the sufficiency of the complaint raised by filing a general demurrer.—*Ecclesine v. Great Northern Ry. Co.*, 470.

Accident Insurance—Death—Complaint—Sufficiency.

31. The complaint in an action to recover upon an accident insurance policy which, among other things, provided for indemnity for loss of life by external, violent and accidental means, alleging, in substance, that the insured sustained bodily injury caused solely by such means, to wit, by a gunshot wound in the neck fired by his wife, *etc.*, held sufficient to show accidental death.—*Withers v. Pacific Mut. Life Ins. Co.*, 485.

Contracts of Sale—Inconsistent Defenses—Rescission—Breach of Warranty—Election of Remedies.

32. In an action to recover the purchase price of farm machinery in which defendant relied as defenses on rescission of the contract for failure of consideration and on breach of warranty, the court erred in refusing plaintiff's motion to compel defendant to elect on which of the two inconsistent defenses he would rely.—*Advance-Rumely Thresher Co. v. Terpening*, 507.

Pleadings—Inconsistent Defenses Permissible, When.

33. Inconsistent defenses may be pleaded, provided they are not so far inconsistent as to be incompatible.—*Advance-Rumely Thresher Co. v. Terpening*, 507.

Attorney and Client—Fees—Complaint—Negative Pregnant.

34. The complaint in an action to recover attorneys' fees, which, after setting forth the rendition of the services at defendants' special instance and request and their reasonable value, alleged "that the defendants have not paid the same or any part thereof," held not open to the objection that the allegation of nonpayment was pregnant with the admission that someone other than the defendants might have paid the amount claimed before the action was begun, since there is no presumption that anyone will pay the debt of another.—*Spaulding v. Lambros*, 536.

Amendment of Pleadings to Conform to Proof—Discretion.

35. Permission to a party to amend his pleading to conform to the facts proven is a matter within the discretion of the trial court.—*Williams v. Thomas*, 576.

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PRESUMPTIONS.**Slander—Construction of Language.**

1. Alleged slanderous words are to be construed in their usual, popular and natural meaning and common use, is, in the sense in which persons out of court and of common intelligence would understand them, the parties present so understood them.—

Equity—Admission of Irrelevant Testimony.

2. In an equity case tried to the court, it will be assumed on appeal that incompetent and irrelevant testimony admitted during the course of the trial was disregarded by it in arriving at its decision.—*Lagier v. Lagier*, 267.

Appeal and Error—Trial by Court—Immaterial Evidence.

3. Where the trial judge in an action tried without a jury stated to counsel that in rendering his decision he would disregard all evidence objected to as immaterial if he found it to be so, it will be presumed on appeal that he did so, and hence that appellant suffered no prejudice.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Attorney and Client.

4. An attorney is presumed to have authority to appear for the party he assumes to represent, until the contrary is shown.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Accident Insurance—Burden of Proof—Rebuttal.

5. In an action on an accident insurance policy, the burden was upon plaintiff to show that death was caused by external, violent and accidental means; whereupon, to defeat liability under the policy, it was incumbent on the defendant to rebut the case thus made, the presumption being that the shot which caused death was fired by decedent's wife accidentally and not with intent to murder.—*Withers v. Pacific Mut. Life Ins. Co.*, 485.

Probate Courts of Other States—Jurisdiction.

6. A decree made by a court of another state will be presumed to have been made within jurisdiction.—*In re Estate of Bruhns*, 526.

Homicide—Innocence.

7. The homicide being established, nothing else appearing, the presumption of innocence is overcome, and the presumption that defendant intended the ordinary consequences of his voluntary act comes to the aid of the prosecution and establishes the necessary element of malice.—*State v. Colbert*, 584.

Malicious Prosecution—Malice.

8. In an action for malicious prosecution, malice may be presumed in the absence of probable cause.—*Beadle v. Harrison*, 606.

Negligence.

9. Negligence is not to be presumed, but must be proven.—*Loudon v. Scott*, 645.

Physicians and Surgeons—Negligence in Administering Anesthetic.

10. Since the evidence disclosed that the element of danger is present in every instance where a patient is anesthetized, negligence could not be presumed from the fact that it was dangerous to administer the anesthetic before he had entirely recovered from over-indulgence in strong drink or from the fact that he died shortly thereafter.—*Loudon v. Scott*, 645.

Same.

11. There is no presumption that a physician has authority to detain a patient in a hospital a sufficient length of time to enable him to recover from the effects of intoxication before undergoing an operation, any more than that he may operate upon him without his consent.—*Loudon v. Scott*, 645.

PROBATE PROCEEDINGS.

Jurisdiction of probate courts,—see Estates of Deceased Persons, 1, 2, 4-6.

Testamentary trusts—Termination,—see Estates of Deceased Persons, 1-3.

PROHIBITION ACT.

Constitutionality,—see Intoxicating Liquors.

PRINCIPAL AND AGENT.

See, also, Corporations, 1, 2.

Agency—Apparent Authority—How Determined.

1. The apparent authority of an agent to act as the representative of his principal must be gathered from all the facts and circumstances in evidence, and is, ordinarily, a question of fact.—*Campbell v. Oriental Trading Co.*, 520.

Local Agent—Scope of Authority.

2. An agent to whom is intrusted the management of its local affairs may bind his company by a contract necessary and proper to be made in the ordinary prosecution of its business.—*Campbell v. Oriental Trading Co.*, 520.

Liability of Principal—Evidence—Sufficiency.

3. *Held*, that evidence showing, among other things, that it was the duty of the agent of a company engaged in furnishing crews of laborers for railroad track maintenance work, to arrange for the needs of the crews and get things in shape so that the men would be taken care of, *etc.*, his principal was liable for goods purchased by him in the shape of groceries, supplies, *etc.*—*Campbell v. Oriental Trading Co.*, 520.

Corporations—Authority of Local Agent—Liability of Principal—Evidence—Sufficiency.

4. *Held*, on the authority of *Campbell v. Oriental Trading Co.*, *ante*, p. 520, that where a reputed agent of defendant directed plaintiff to furnish to the foreman of a gang of railway track laborers supplies necessary for their maintenance, the same to be charged to the company, the latter was liable, it appearing, *inter alia*, that defendant had paid for the first bill of goods so sold but declined to pay for the one in suit.—*Montana Meat Co. v. Oriental Trading Co.*, 524.

PROHIBITION.

See, also, Drains and Drainage Districts, 1.

Person—"Beneficially Interested"—Conclusions.

1. Unless facts are shown by relator in his affidavit on application for writ of prohibition that he is beneficially interested, his bare assertion that he is so interested is a legal conclusion and insufficient.—*State ex rel. Examining and Trial Board v. Jackson*, 90.

City Officers—Persons "Beneficially Interested."

2. *Held*, that the mayor of a city and the members of the examining and trial board of its police department as such were "beneficially interested," within the meaning of section 7228, Revised Codes, in their application for a writ of prohibition to stay *certiorari* proceedings instituted by a discharged police officer to review the board's action, which latter writ commanded relators, among

other things, to return to the district court a transcript of the testimony introduced before them, which they claimed to be unable to do.—State ex rel. Examining and Trial Board v. Jackson, 90.

Writ Lies, When.

3. Under the rule that prohibition lies not only to prevent what remains to be done, but to undo what has been done, the writ will run to stay proceedings under *certiorari* improperly issued on an affidavit lacking the essentials to give the district court jurisdiction. State ex rel. Examining and Trial Board v. Jackson, 90.

Lies When Remedy by Appeal Insufficient.

4. Relief by writ of prohibition is proper where, though an appeal lies, the district court cannot, for lack of jurisdiction, render a valid judgment under any conceivable circumstances.—State ex rel. Examining and Trial Board v. Jackson, 90.

PROMISSORY NOTES.

Ownership at time of conversion of property covered by chattel mortgage,—see Conversion.

Defenses—Execution of Release Under Threats—Jury Question.

1. Where, in an action on a promissory note in which the maker interposed the defense that he had been released from liability thereon by an instrument in writing executed by plaintiff, in reply to which the latter alleged want of consideration, in that the release had been secured by intimidation and threats of imprisonment, the question whether the release had been procured under the overpowering influence of threats or fear, and therefore without consideration, was for the jury's determination.—Williams v. Thomas, 576.

Release—Execution Under Fear of Imprisonment—Effect.

2. Execution of an instrument under fear of imprisonment is sufficient to make it voidable.—Williams v. Thomas, 576.

PUBLIC INDEBTEDNESS.

See Bonds.

PUBLIC LANDS.

Agreement as to boundaries,—see Boundaries, 1-3.

Nature of Grant of Right of Way Over.

1. *Held*, that the grant of a right of way for the construction of a highway over public lands not reserved for public use, made by section 2477, U. S. Rev. Stats. is not one *in praesenti*, but is no more than an offer of so much land as may be necessary for the purpose of a right of way, and takes effect or becomes fixed only when a highway is definitely established or constructed in some one of the modes authorized by the laws of the state, *inter alia*, by user by the public of the exact route confined to the statutory width of a highway for the period of the statute of limitations as to lands, *i. e.*, ten years.—State ex rel. Dansie v. Nolan, 167.

PUBLIC POLICY.

Attorney and Client—Contracts—Securing Alien's Exemption from Military Service.

1. An agreement between an attorney and an alien who had not declared his intention to become a citizen of the United States,

to establish the latter's exemption from military service under the Selective Service Act, was not void as in contravention of public policy, since, under that Act, aliens were not liable to military service during the war.—*Spaulding v. Lambros*, 536.

QUANTUM MERUIT.

See, also, *Variance*, 1.

Work and Labor—Implied Contracts.

1. Where the president and general manager of a corporation with full knowledge of an agreement between plaintiff and its secretary, which was to be reduced to writing but was never completed, under which plaintiff was to continue in charge of its property and care for it as he had theretofore done under a previous contract which had expired, and personally instructed him to remain in charge and that he would be reimbursed for expenses incurred and compensated for his services, plaintiff was entitled to recover under an implied contract.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Same—Reasonable Value—Evidence—Sufficiency.

2. In an action on an implied contract for services rendered in taking care of orchard property, where it appeared that he had been paid \$125 a month for like services under a previous contract, and that under a contemplated contract which failed of execution he was to receive \$100 for the same services, a finding by the court in a trial without a jury that \$100 per month was their reasonable value was proper, although plaintiff did not state in his testimony what his services were worth and there was no specific evidence on the question of value.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

Same—Value of Services—Trial by Court—Evidence—Inferences.

3. In an action of the nature of the above tried without a jury, the trial judge may properly draw upon his own experience and observation in order to determine what plaintiff's services were reasonably worth, in the absence of specific evidence in that respect.—*Hopkins v. Paradise Heights F. G. Assn.*, 404.

QUIETING TITLE

Burden of Proof—Failure of Proof.

1. Where, in an action to quiet title, the issue was the location of a railroad right of way upon plaintiff's land and the burden of proof was, by stipulation, upon the railway company to show that the ground occupied by it was conveyed to it by a deed, failure to prove its location with reference to the land claimed by plaintiff amounted to a failure of proof and warranted judgment for plaintiff.—*Cobban Realty Co. v. Chicago etc. Ry. Co.*, 188.

RAILROADS.

See, also, *Personal Injuries*.

Right of way—Quieting Title—Deeds—Estoppel,—see *Quieting Title*, 1.

Trespassers in city yards—Duty owing to,—see *Personal Injuries*, 1.

RECORD.

In contempt proceeding.—see *Contempt*, 8, 11, 12.

In criminal cases—Errors reviewable,—see *Appeal and Error*, 29.

On appeal by state from order sustaining demurrer to information,—see Appeal and Error, 20.

On appeal—Failure to file in time—Dismissal,—see Appeal and Error, 30.

RELEASE.

Of creditor,—see Assignment for Benefit of Creditors, 3, 4; Promissory Notes, 1, 2.

REMEDIES.

Election of,—see Pleading and Practice, 32.

Of one charged with contempt,—see Contempt, 9.

Removal of police officer,—see Cities and Towns, 6.

Breach of warranty,—see Contracts, 15.

RESCISSION.

See Estoppel, 5.

RES IPSA LOQUITUR.

Inapplicability of Doctrine.

1. The doctrine of *res ipsa loquitur* has no application to a malpractice case.—*Loudon v. Scott*, 645.

ROADS.

See Highways.

SALES.

See Contracts; Principal and Agent.

SEDITION.

See Criminal Law, 1-12, 18-21.

SHERIFFS.

Wrongful attachment—Suit on official bond,—see Attachment, 1, 2.

SLANDER.

See Libel and Slander.

SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 18-23.

SPECIFIC PERFORMANCE.

Discretion.

1. Specific performance is not granted as a matter of right, but in every instance the application is addressed to the sound discretion of the court.—*Babcock v. Engel*, 597.

Defense—Intoxication—Contract Voidable, When.

2. If defendant in a suit for specific performance of a contract to sell and convey realty was so far under the influence of intoxicating liquor at the time he signed the contract that he was incapable of giving his assent, it was voidable at his election when he became sober.—*Babcock v. Engel*, 597.

Intoxication—Evidence—Sufficiency.

3. Evidence *held* to show some substantial support for the finding that when defendant entered into a contract for sale of realty, specific performance of which was sought by the buyer, defendant was intoxicated.—*Babcock v. Engel*, 597.

Inadequacy of Consideration—Statutory Defense.

4. By express declaration of section 6103, Revised Codes, inadequacy of consideration is made a defense to an action for specific performance of a contract.—*Babcock v. Engel*, 597.

Defense of Intoxication—Question of Fact.

5. The question whether a party to a contract was so far under the influence of intoxicating liquor as to render him incapable of giving his consent is one of fact, to be determined from all the evidence.—*Babcock v. Engel*, 597.

Intoxication—Inadequacy of Consideration—Burden of Proof.

6. Where in a suit for specific performance the defense of inadequacy of consideration is coupled with that of intoxication, the rule that where defendant relies on the defense of intoxication alone, he must show that he was so far under the influence of intoxicants as to render him incapable of consent at the time the contract was executed, is less stringent, on the theory that equity will not compel the performance of an unjust contract procured from one under the influence of intoxicants whereby he was more easily influenced into a bad bargain than when sober.—*Babcock v. Engel*, 597.

Trial—Theory of Case—Appeal.

7. The issue of inadequacy of consideration, though improperly joined with the defense of latent defects in the property which was the subject of a suit for specific performance, having been tried as though properly before the court, appellant was estopped to urge on appeal that the issue was not properly raised by the pleadings.—*Babcock v. Engel*, 597.

STATES.

Creating indebtedness,—see Constitution, 2; Taxation, 1-3.
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STATUTES AND STATUTORY CONSTRUCTION.

Constitutionality,—see Constitution.

Surplusage.

1. Words in a statute which can be given no effect consistent with the plain intent of the statute, or words which, if given effect, may defeat the manifest purpose of the Act, should be eliminated or regarded as surplusage.—State ex rel. Lyman v. Stewart, 1.

Definition of Words.

2. Where words have, in the law, a well-defined meaning, their use in a statute, without specific definition, does not render the Act inoperative for uncertainty.—State ex rel. Lyman v. Stewart, 1.

Terminal Grain Elevator Act—Constitutionality.

3. Chapter 150, Laws of 1919, authorizing erection of state-owned terminal grain elevators construed and held constitutional.—State ex rel. Lyman v. Stewart, 1.

Workmen's Compensation Act—Unconstitutional Provision.

4. Section 22d of the Workmen's Compensation Act attempting to confer jurisdiction upon the supreme court to try *de novo* a case appealed to it from the district court, *held* unconstitutional.—Willis v. Pilot Butte Min. Co., 26.

District Judges—Disqualification for Imputed Bias—Statutes.

5. Section 6315, Revised Codes, as amended by Laws of 1909, Chapter 114, relative to the disqualification of a district judge for imputed bias, and sections 6506 and 6507, relative to change of venue after such disqualification has been effected, are companion measures and must be construed together.—State ex rel. Wooster v. District Court, 50.

Prohibition Act—Federal Constitution—Effect of Eighteenth Amendment.

6. *Held*, that in adopting the eighteenth amendment to the federal Constitution, the states did not deprive themselves of the power to make laws for their internal government upon the subject of intoxicating liquors, but merely surrendered the power to legalize and permit the traffic, retaining the right to enforce within their own territory provisions against violations of the acts prohibited thereby; and so long as legislation of a state actually seeks to enforce by appropriate legislation what is prohibited by such amendment, it is not objectionable, even though the state law may differ from that of Congress.—State ex rel. Stranahan v. District Court, 684.

Same—Enforcement of Prohibition—Concurrent Federal and State Authority.

7. By section 2 of the eighteenth amendment to the federal Constitution, providing that the several states shall have concurrent jurisdiction to enforce the provisions of the amendment, a dual authority in this respect is established, coextensive on the part of federal and

state authorities within the boundaries of the state.—State ex rel. Stranahan v. District Court, 684.

Same—Prohibition Act—Validity.

8. The fact that Chapter 175, Laws of 1917, prohibiting the liquor traffic, was enacted prior to the adoption of the eighteenth amendment does not render it inoperative, since it has the same purpose in view as that embraced in the amendment, and the provision in section 2 of the amendment authorizing the states to enforce it by "appropriate legislation" not of necessity requiring future legislation if existing laws are adapted to that end.—State ex rel. Stranahan v. District Court, 684.

Same—Single Act Constituting Violation of Federal and State Laws—No objection to Validity of State Act.

9. That a single act may constitute an offense against both federal and state laws against traffic in intoxicating liquors, for which defendant may be tried and convicted by either government, or by both, is not an objection to the validity of Chapter 175, Laws of 1917.—State ex rel. Stranahan v. District Court, 684.

STATUTES OF LIMITATION.

See Limitations of Actions.

STIPULATIONS.

Binding on court and parties,—see Evidence, 36.

SUPERVISORY CONTROL.

Contempt—Extent of Review.

1. On writ of supervisory control to review an order finding relators guilty of contempt for violation of a decree adjudicating water rights, attacked on the ground of the insufficiency of the evidence to sustain it, the supreme court can only determine whether the district court, acting within jurisdiction, had before it substantial evidence to support the order, its weight and the credibility of witnesses being matters within the exclusive province of that court.—State ex rel. Keiley v. District Court, 272.

Same—Remedies of Contemnor.

2. One adjudged guilty of a contempt of court may have the proceedings reviewed on application for writ of *certiorari* or supervisory control.—State ex rel. Rankin v. District Court, 276.

When Writ Available.

3. Where the remedy by appeal is inadequate, the writ of supervisory control may issue to enable the supreme court to control the course of litigation in inferior courts proceeding by mistake of law or willful disregard of it or are doing a gross injustice.—State ex rel. Cash v. District Court, 316.

Divorce—Custody of Minor *Pendente Lite*—Removal from Jurisdiction.

4. *Held*, that where defendant wife in a divorce proceeding had been awarded the custody of a minor child pending determination of the action with the restriction that the child be kept within the jurisdiction of the court, which order was subsequently modified so as to permit her to take it to a city outside the state on her promise to return it for trial of the cause, the order was properly annulable under the supervisory control power of the supreme court, since the district court would be in no position to enforce any subsequent order it might make in case defendant did not keep her promise to return

to the jurisdiction with the child.—*State ex rel. Cash v. District Court*, 316.

Same—Contempt—Failure to Pay Alimony—Supervisory Control—Writ Does not Lie, When.

5. The writ of supervisory control does not lie to relieve one from punishment under an order finding him guilty of contempt for failure to pay temporary alimony, where he neither made application for a modification or revocation of, nor appealed from, the order awarding the alimony.—*State ex rel. Scott v. District Court*, 353.

Availability of Remedy by Appeal—When not Bar to Writ.

6. The fact that an appeal lies from an order sought to be annulled on application for writ of supervisory control, is ordinarily a conclusive reason for denial of the application; where, however, the facts alleged make out an exigent case and it is apparent that the appeal will not afford adequate relief it is sufficient to warrant action by the supreme court.—*State ex rel. Philbrick v. District Court*, 376.

Defense—What is not.

7. Since defendants, charged with a violation of the Prohibition Act and discharged by the trial court on the ground that the Act was inoperative, were not parties in a proceeding under writ of supervisory control requiring the court to show cause why the order of discharge should not be set aside, it (the court) could not defend on the ground that the issuance of the writ would place defendants in jeopardy a second time.—*State ex rel. Stranahan v. District Court*, 684.

Exigency Warranting Issuance of Writ.

8. A holding of the district court that the Prohibition Act (Chap. 175, Laws 1917) was inoperative, by reason of which the prosecuting officers were rendered powerless to enforce its provisions in the district, *held* to have created a sufficient exigency to warrant the issuance of writ of supervisory control to review the court's decision.—*State ex rel. Stranahan v. District Court*, 684.

SUPREME COURT.

See Appeal and Error; Jurisdiction; Various Original Writs.

SURETIES.

On official bonds—Liability,—see Notaries Public, 1-3; Attachment, 1,2

TAXATION.

Lands "Agricultural in Character"—Definition.

1. *Held*, that the words "agricultural in character" as used in section 4, Chapter 150, Laws of 1919, referring to lands subject to taxation for the purpose of creating the "terminal elevator fund," are sufficiently definite and certain to enable assessing officers in determining what lands they shall list, the term meaning lands susceptible of being plowed and seeded or from which crops may be produced.—*State ex rel. Lyman v. Stewart*, 1.

States—Creating State Debt—Constitution.

2. Chapter 150, Laws of 1919, section 4, though needing revision, *held* not so defective as to render it unconstitutional under section 2, Article XIII of the Constitution, which declares that when a state debt is created, provision shall be made for the levy of a tax for payment of the principal and interest.—*State ex rel. Lyman v. Stewart*, 1.

Terminal Elevator Statute—Tax Levy—Sufficiency—Legislative Question.

3. Whether a tax levy provided by the legislature for the erection and maintenance of state owned terminal grain elevators is sufficient to meet the obligation of the state is a legislative question with which the court has nothing to do, and, in the absence of a showing of insufficiency, it will be presumed to be ample.—*State ex rel. Lyman v. Stewart*, 1.

Cities and Towns—Bonds and Interest—How Payable.

4. Where a contemplated city bond issue is beyond the three per cent limit and is authorized by section 6, Article XIII, of the Constitution, the revenues of its water plant are irrevocably set aside for the discharge of the principal and interest, and a taxpayer who is not a water user cannot be called upon to contribute unless the revenues of the plant are insufficient, in which event only a property tax may be levied to supply the deficiency.—*Edwards v. City of Helena*, 292.

Same.

5. Where the three per cent margin of a city's indebtedness is sufficient to admit of a contemplated bond issue of the nature of the above, the bonds become the ordinary obligations of the city to be redeemed by funds derived from direct taxes upon property within its limits, unless other provisions are made for the payment of principal and interest.—*Edwards v. City of Helena*, 292.

Same—Injunction—Taxpayer's Suit—When Dismissal Proper.

6. Where the situation of plaintiff taxpayer, in an action to enjoin the issuance and sale of municipal bonds for water supply purposes on the ground that the contemplated increase in the city's indebtedness was unauthorized because it still had a borrowing capacity within the constitutional three per cent limit, rendering the council's action in classifying the bonds as falling without the limit unnecessary, was no different from what it would have been had the council made the correct declaration in the ordinance calling a special election, he was not injured, and judgment of dismissal was proper.—*Edwards v. City of Helena*, 292.

Property in Transit not Taxable.

7. *Obiter*: Property being transported in interstate commerce, while actually in transit through the state is not taxable.—*Hayes v. Smith*, 306.

Personal Property—Taxing Power—*Situs* of Property.

8. The taxing power of the state is limited to subjects which have acquired a *situs* within it for the purpose of taxation.—*Hayes v. Smith*, 306.

Same—Date on Which Property Taxable—Power of Legislature.

9. The legislature has the power to fix a definite date as to which the *situs* of personal property for taxation is to be determined.—*Hayes v. Smith*, 306.

Same—*Situs* of Property.

10. *Held*, that in order for personal property, other than the net proceeds of mines, to acquire a *situs* for the purpose of taxation, it must be within the state and subject to its jurisdiction at 12 o'clock noon on the first Monday in March.—*Hayes v. Smith*, 306.

Migratory Livestock—Statute—Unconstitutionality.

11. *Held*, that section 2531, Revised Codes, which provides for the taxation of livestock brought into the state for grazing purposes and which by implication confines its operation to stock brought in after March 1 of any one year, without including all

other property of the same class so brought in, is unconstitutional as violative of the uniformity rule in matters of taxation.—*Hayes v. Smith*, 306.

Same—Discrimination Between Property of Same Class.

12. The state may designate one date to which the assessment of property belonging to one class shall relate, and a different date as to property belonging to a different class, but may not discriminate against particular property belonging to any class.—*Hayes v. Smith*, 306.

TERMINAL GRAIN ELEVATORS.

See Constitution, 1, 2; Taxation, 1-3.

TESTAMENTARY TRUSTS.

Termination,—see Estates of Deceased Persons, 1-3.

THEORY OF CASE.

See Appeal and Error, 24, 25, 27.

THREATS.

Of imprisonment—Release from payment of promissory note,—see Promissory Notes, 1, 2.

TIME.

Essence of contract of insurance,—see Insurance, 9.

Challenging Authority of Attorney to Act.

1. *Semble*: While the statute does not declare when a motion calling upon an attorney to show by what authority he appeared must be made, it would seem that it should be made whenever during the progress of the case the party desiring to present the question comes into possession of facts furnishing a reasonable ground for the belief that the attorney for the adversary party is acting without authority.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

TRESPASSERS.

In railway yards—Duty owing to, by railroad company,—see Personal Injuries, 1.

TRIAL.

See different subjects pertaining to Trial.

TRUSTS.

Testamentary trusts—Termination,—see Estates of Deceased Persons, 1-3.

UNDUE INFLUENCE.

See Contracts, 28-32.

VARIANCE.

Contracts—*Quantum Meruit*—Evidence.

1. A party to an express contract may sue on *quantum meruit*, and, on showing performance, introduce the contract to prove reasonable value of the services rendered, such evidence not being objectionable on the ground of variance.—*Wilcox v. Newman*, 54.

When Immaterial.

2. A variance which did not mislead defendant to his prejudice was insufficient, under section 6585, Revised Codes, to warrant the granting of a nonsuit.—*Wilcox v. Newman*, 54.

Duty of Party Alleging.

3. Where defendant moves for a nonsuit on the ground of variance, he must be able to prove to the satisfaction of the trial court how he was misled to his prejudice, the mere allegation that he was so misled being insufficient.—*Wilcox v. Newman*, 54.

Failure to Amend—Nonsuit.

4. Where defendant failed to ask permission to amend his counter-claim though his attention had been called to a variance between his allegations, both by objection to the introduction of testimony in support of it and plaintiff's motion for nonsuit because of the variance, the order of the court granting the motion will not be disturbed on appeal.—*Wipf v. Kelleher*, 87.

VERDICTS.

See, also, *Jury*.

Directed verdict of acquittal, when proper,—see *Criminal Law*, 14, 15.

Directed Verdict—Motion by Both Parties—Effect.

1. Where both parties at the close of the testimony moved the court for a directed verdict and the motion of plaintiff was granted, failure of defendant to request the submission of a certain issue to the jury amounted to a waiver of determination by the jury; and the question of fact involved was one for decision by the court.—*Bank of Commerce v. United States F. & G. Co.*, 236.

Special—Rendition of Judgment.

2. Where in an action at law the court directs the jury to return a special verdict, it is its duty to render the proper judgment in open court.—*McIntyre v. Northern Pac. Ry. Co.*, 256.

Accident Insurance—Directed Verdict—When Proper.

3. *Held*, that plaintiff's evidence simply showing that deceased died on a certain day from a wound in the neck caused by a bullet from a revolver fired by his wife, was sufficient to make out a *prima facie* case, and that, in the absence of evidence on the part of defendant, the court was warranted in directing a verdict for plaintiff.—*Withers v. Pacific Mut. Life Ins. Co.*, 485.

Conflict in Evidence—Directed Verdict for Defendant—Error.

4. Where the evidence in an action of the nature of the above was in sharp conflict on the issues involved, the court committed error in directing a verdict for defendant.—*Beadle v. Harrison*, 606.

Directed Verdict—When Proper.

5. Where the evidence is in such a condition that if the case should be submitted to the jury, and a verdict for the plaintiff returned, it would be the duty of the supreme court to set it aside, a motion by defendant for a directed verdict should be granted.—*Mandoli v. National Council, etc.*, 671.

WAIVER.

Defect of parties,—see *Pleading and Practice*, 6, 7.

Insurance—Conditions of Policy.

1. Where an insurance policy contains a provision against waiver by an agent of the insurer, it is both notice to and agreement by

the policy-holder that no agent has authority to waive any of its conditions.—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—What Does not Constitute.

2. Letters in which insurer, among other things, denied liability on the ground that the requirement as to notice had not been met and in which it was expressly stated that nothing therein was to be construed as a waiver, *held* incapable of construction as a waiver. *Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Unreasonable Provision.

3. *Quaere*: Is a provision in an insurance policy that no waiver shall be valid unless in writing from the home office and signed by its president or vice-president, and the secretary or assistant secretary, a reasonable one?—*Tuttle v. Pacific Mut. Life Ins. Co.*, 121.

Same—Forfeiture—Burden of Proof.

4. Where plaintiff in an action on a life insurance pleaded reinstatement after forfeiture resultant from nonpayment of an installment of the premium, asserting that the insurer waived the provision of the contract which required the insured to furnish a certificate of good health satisfactory to the company as a condition precedent to reinstatement, she had the burden of establishing the waiver of forfeiture.—*Nelson v. Mutual Life Ins. Co.*, 153.

Same—Retention of Payment of Arrearage—When not Waiver.

5. Where, two months after an insurance policy had lapsed, insured sent a check covering the arrearage, without, however, including interest thereon as provided in the contract, the company retaining the check and advising him that it would be held in suspense until he had furnished a satisfactory certificate of health, the retention of the check alone did not constitute a waiver of forfeiture or result in reinstatement.—*Nelson v. Mutual Life Ins. Co.*, 153.

Corporate Capacity—Defective Complaint—Failure to Demur.

6. In the absence of a special demurrer pointing out that the complaint was defective in that the corporate capacity of defendant was alleged only as of the date of the commencement of the action for damages instead of as of the date of the conversion, the formal defect *held* not fatal when urged for the first time on appeal.—*Didriksen v. Broadview Hardware Co.*, 421.

Challenging Authority of Attorney to Act.

7. Where defendant desires to make a motion calling upon plaintiff's attorney to show by what right he appears in the cause, he should make it upon his first appearance or at the earliest time he can make it, otherwise he will be deemed to have waived his right to make it.—*Missoula Belt Line Ry. Co. v. Smith*, 432.

Complaint—Challenging Sufficiency—Effect of Exception.

8. Where defendant challenges the sufficiency of the complaint by demurrer, or by objection to the introduction of evidence, his exception once saved to an adverse ruling is saved for all purposes during the proceedings in the case, and failure to repeat the objection thereafter when the same question is raised does not constitute a waiver.—*Ecclesine v. Great Northern Ry. Co.*, 470.

Breach of Warranty—Notice—Retention and Use of Article After Discovery of Defect.

9. Retention and use of farm machinery for more than two years after discovery of an alleged breach of warranty, without attempt on the part of the buyer to comply with the terms of the contract

of sale requiring him to give immediate notice to the vendor of defects discovered, barred him from relying on the breach as a defense in an action to recover on the notes given in payment.—*Advance-Rumely Threshing Co. v. Terpening*, 507.

Criminal Law—Former Jeopardy.

10. The plea of former jeopardy is a privilege of which one accused of crime may or may not avail himself, and which he may waive.—*State ex rel. Stranahan v. District Court*, 684.

WARRANTY.

Breach—Measure of damages—Waiver,—see Contracts, 17, 19.

In life insurance policy,—see Insurance, 15, 16.

WATERS AND WATER RIGHTS.

See **Contempt**, 1, 2.

WILLS.

See, also, **Estates of Deceased Persons**, 1, 2.

Construction—Testamentary Trust.

1. A will under which all of testator's estate was bequeathed to one of his sisters to be held in trust for another who was to receive a stated amount each year for life, the trustee to have what remained at the death of the beneficiary, construed, and *held* that it was the intention of the testator that the trust should continue during the life of the beneficiary and that therefore the latter, as only heir of the trustee, was not entitled to have the entire estate delivered to her on the death of the trustee.—*Philbrick v. American Bank & Trust Co.*, 376.

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WORDS AND PHRASES.

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WORK AND LABOR.

See, also, Pleading and Practice, 2; Evidence, 8; *Quantum Meruit*.

Evidence—Sufficiency.

1. In an action for services rendered by plaintiff as cook and servant girl, in which defendants claimed that there was no agreement to pay plaintiff any wages, but that in return for such services as she might render they were to furnish her a home, clothing, entertainment, education, etc., evidence held sufficient to support a judgment for plaintiff.—*Zalac v. Barich*, 428.

WORKMEN'S COMPENSATION.

Compensation Act—Appeal to Supreme Court—Trial *De Novo*—Unconstitutional Provision of Act.

1. To the extent that section 22(d) of the Compensation Act (Chap. 96, Laws 1915) attempts to confer jurisdiction upon the supreme court to try *de novo*, in the sense that a case appealed to the district court from a justice's court is tried anew, a case appealed to it from the district court and brought into that court on appeal from an award made by the Industrial Accident Board, it is invalid as violation of sections 2 and 3, Article VIII, Constitution.—*Willis v. Pilot Butte Mining Co.*, 26.

Same—Appeal to District Court—Jurisdiction.

2. Held, that while section 22(b) of the Compensation Act provides that on appeal to the district court from an award of the Industrial Accident Board the trial shall be *de novo*, the power thus given is that of review rather than that of retrial.—*Willis v. Pilot Butte Mining Co.*, 26.

Same—Findings of District Court—When Conclusive.

3. On appeal from an award made under the Compensation Act, after review by the district court, the supreme court will not reverse the findings of that court unless the evidence clearly preponderates against them.—*Willis v. Pilot Butte Mining Co.*, 26.

Same—Death of Employee by Assault—When Injury Arising Out of Employment.

4. Held, that while injuries received by an employee during a personal altercation with a co-worker, in no way connected with his duties, do not give rise to a claim for compensation under Chapter 96, Laws of 1915, where a mine foreman killed a station-tender in a fit of anger because deceased had signaled the engineer to hoist the cage upon which they were riding to the surface instead of to a certain level in the mine, the death arose out of the employment, and that therefore his widow was properly allowed compensation.—*Willis v. Pilot Butte Mining Co.*, 26.

Appeal to District Court—Findings of Industrial Accident Board—When Conclusive.

5. On appeal to the district court from an award made by the Industrial Accident Board under the provisions of the Workmen's Compensation Act (Chap. 96, Laws 1915), tried upon the record made before the board, the court should not reverse the findings of the board unless the evidence clearly preponderates against them, the board having been in better position to determine of the credibility of the witnesses and the weight to be given to their testimony than can the court from an inspection of the record.—*Morgan v. Butte Central Min. etc. Co.*, 633.

Dependency—What not Evidence of.

6. Voluntary contributions made by a workman during his lifetime to one claiming benefits under the Workmen's Compensation Act as a minor dependent are not necessarily evidence of dependency.—*Morgan v. Butte Central Min. etc. Co.*, 633.

Same—How Determined.

7. In determining whether one was a dependent within the meaning of the Workmen's Compensation Act, the Industrial Accident Board is not concerned with problematical future conditions, but only with the condition of the claimant (dependent) at the time of the injury to decedent, and for a reasonable period prior thereto. *Morgan v. Butte Central M. & M. Co.*, 633.

Who is not "Dependent."

8. One claiming benefits accruing to him as a "minor dependent" can do so only when he is an invalid, i. e., one who is physically and mentally incapacitated; if he is able to support himself by his own efforts in any branch of physical or mental endeavor, he cannot be said to be "incapacitated."—*Morgan v. Butte Central M. & M. Co.*, 633.

WRITS.

See Attachment; Certiorari; Injunction; Mandamus; Prohibition; Supervisory Control.

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